In the Supreme Court
of the
United States

October Term, 1924.

No. 365

Industrial Association of San Francisco, California Industrial Council, Industrial Association of Santa Clara County, et al.,
Appellants,

vs.

The United States of America,
Appellee.

BRIEF FOR APPELLANTS.

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BRIEF FOR APPELLANTS.

Statement.

This case arises out of an industrial dispute in San Francisco. It is an attempt to terminate an industrial conflict through the use of the Anti-Trust Act.

The United States of America filed its bill of complaint in the District Court for the Northern District of California alleging that the defendants had entered

Note: Tranacript references are indicated thus; (p.—).

into a conspiracy to restrain interstate commerce, contrary to the Anti-Trust Act of July 2, 1890 (26 Stat. 209).

After trial the District Court entered its decree in favor of the United States, and the defendants have appealed from the decree directly to this court, under the provisions of Section 2 of the Act of February 11, 1903 (32 Stat. 823).

The theory of the proceeding was that these defendants by refusing to sell building materials to persons who maintained the "closed union shop" on building work in San Francisco, had restrained interstate commerce.

The bill of complaint, after reciting that it is brought at the direction of the Attorney General under the provisions of the Anti-Trust Act alleges that for three years the defendants have engaged and are continuing and threatening to continue to engage in a conspiracy to restrain trade and commerce in violation of that act. It sets forth that the means and methods agreed by the defendants to be employed and actually employed in furtherance of the conspiracy were as follows:

1. Refusing to sell building materials to purchasers unless such purchasers would agree (a) to employ a foreman and at least 50% of laborers who were not members of a labor union; and (b) to carry out the "American Plan".
2. Collusively bidding for the furnishing of materials or the construction of buildings.
3. Determining arbitrarily who should engage in the furnishing of building materials.

4. Preventing by threats and otherwise, others from engaging in the furnishing of building materials or constructing buildings.
5. Agreeing that no persons save members of the Builders Exchange or the Industrial Association should engage in the furnishing of materials or construction of buildings.
6. Fixing wages arbitrarily, to enhance their profit or profits.
7. Fixing arbitrarily the persons who should be employed in the construction of buildings.
8. Distributing secret lists containing the names of persons who refused to join the Builders Exchange or the Industrial Association.
9. Coercing others from resorting to redress through the courts.
10. Agreeing with banks to coerce the competitors of defendants to become members of the Builders Exchange and the Industrial Association.
11. Discriminating against laborers who were members of trade unions.
12. Agreeing to form and forming the Builders Exchange and the Industrial Association.
13. Agreeing to be bound by and carrying out the rules of the Builders Exchange and the Industrial Association (p 3).

None of these alleged illegal acts are specifically stated to have been directed against interstate commerce though there is a very vague and general statement to the effect that the defendants were engaged in a conspiracy to restrain such commerce. Moreover,

none of the acts alleged were proved, save and except that it was shown, and indeed admitted by defendants that certain of them had refused to sell building materials to persons who enforced the closed shop.

The prayer of the bill was that the defendants be restrained from carrying out or continuing the conspiracy; that certain of the defendant associations and corporations be dissolved, and that the defendants be restrained from doing any of the specific acts alleged in the complaint.

The defendants consisted of the Builders Exchange, a corporation organized in 1890, and composed of many persons and firms engaged in the building industry in San Francisco, both in the construction of buildings and the supplying of building materials; the Industrial Association of San Francisco, a voluntary association composed of several thousand business and professional men and firms in San Francisco; the Master Plumbers Association, a corporation, and various firms and individuals, some of them members of these organizations and some not, but all connected in some way with these organizations, or with the building industry in San Francisco.

The defendants' answers specifically denied the allegations of the bill, and contained an affirmative statement as to the industrial and labor situation in San Francisco, and of the steps these defendants had taken in an attempt to reach a satisfactory solution of the difficulties in connection with it. They showed further that the defendants had acted to protect their own interests and the interests of the public in an industrial controversy,

that there was no intent whatever to restrain or interfere with interstate commerce, and that any possible effect upon interstate commerce was incidental and remote (p. 7).

An application for an injunction pendente lite was denied, the court saying that

> "if there has been in fact any appreciable interference with interstate commerce resulting from unity of action or purpose on the part of defendants or any number of them, such interference was not sought, desired or intended and that there is at present no threatened or prospective injury to such commerce grave enough to warrant the court to disturb in advance of a trial and upon conflicting affidavits the industrial situation existing in San Francisco and neighboring counties for the past three years" (p. 33).

After the denial of the injunction pendente lite, the case was heard on the merits. Further evidence was then introduced by both parties. The evidence consisted of affidavits, exhibits, and a written transcript of proceedings had in a state court in California against the defendants.

The Judge of the District Court thereafter rendered a written opinion (p. 34). The opinion recognizes that an industrial conflict was in progress in San Francisco between workers and employers and disclaims any intention to interfere with this conflict, or with the ends to be attained. But it finds that certain means employed violated the Anti-Trust Act, and though there was no intent to interfere with interstate commerce, that these practices did, to a certain extent, interfere with the free movement of articles of interstate com-

merce. The court did not believe that the practices interfered with interstate commerce to such an extent as to warrant the dissolution of any of the defendants, but thought there were sufficient interferences to warrant certain injunctive relief.

Pursuant to the court's opinion a final decree was entered. This decree enjoins the defendants from (p. 38):

(a) Requiring any permit for the purchase, sale or use of building materials or supplies produced without the State of California and coming into the State of California in interstate or foreign commerce.

(b) Making as a condition for the issuance of any permit for the purchase, sale or use of building materials or supplies, any regulations that will interfere with the free movement of building materials, plumbers' or other supplies produced without the State of California.

(c) Attempting to prevent or discourage any person without the State of California from shipping building materials or other supplies to any person whatsoever within said State of California.

(d) Aiding, abetting, or assisting, directly or indirectly, individually or collectively, others to do any or all of the matters or things herein set forth.

Specification of Errors.

Defendants specify as error the following (p. 478):

1. The evidence does not show any contract, combination or conspiracy in restraint of trade or commerce among the several states or with foreign nations, or that the defendants, or any of them, engaged in any such combination or conspiracy, or violated in any way the provisions of the Anti-Trust Act. The court therefore committed error in entering its decree in favor of the plaintiff and against the defendants (Assignment of Errors 1, 2, 3, 4, 5, 6, 7, 8, 28, pp. 478 et seq.).

2. The decree is vague, indefinite and uncertain and does not set forth the acts or transactions which are forbidden. The court therefore committed error in entering such decree (Assignment of Errors 19, 20, 21, 22, pp. 478 et seq.).

3. As to certain of the defendants the evidence wholly fails to show any participation in any of the acts or things complained of, or any connection therewith. The court therefore committed error in entering its decree against such defendants (Assignment of Errors 1, 2, 3, 5, 6, 7, 8, 9, 28, pp. 478 et seq.).

Statement of Facts.

(a) Domination of Building Industry in San Francisco By Unions.

San Francisco has long been known as a "Union Town". The building industry there was particularly the subject of union labor domination. Prior to Febru-

ary 1, 1921, that industry was conducted on a strictly closed shop basis; that is, the union workers refused to work for any employer who employed any worker who was not a member of a San Francisco labor union or on any building where a non-union worker was employed. No matter how experienced or qualified a worker might be, or how much the employer might desire or require his services, he could not be employed unless he was a member of a San Francisco union. It is fair to say that less than one per cent of the building workers were without union cards (p. 434).

There were more than fifty separate unions in the building trades industry, each separate craft being organized into a separate union, including not only skilled crafts, but common labor as well.

Not only did the unions demand that the building industry be conducted on a closed shop basis, but they enforced many arduous and uneconomic restrictions upon the building industry, as a result of which costs were increased, production decreased, and progress generally retarded. These restrictions were of the following character:

a. Rules limiting the number of apprentices.
b. Rules limiting the amount of work.
c. Rules limiting the use of labor saving devices.
d. Rules usurping the authority and power of the employer.

The following are typical instances of these restrictions. The plumbers' union enforced the following:

a. No apprentices were allowed in the plumbing trade except journeymen plumbers' sons, from

1905 to March, 1920, and even master plumbers' sons were not allowed to learn the trade from 1907 to 1921. As a result not more than 15 to 25 apprentices learned the trade in San Francisco during this 14-year period (p. 410).

b. No plumber was allowed to bend a pipe to fit it into an offset, but was required to use fittings instead, to cause more work (p. 410).

c. No laborers or carpenters were permitted to cut a hole in concrete to permit the passage of a pipe, no matter how competent the workman nor how small or how simple the work might be (p. 409).

d. No union plumber would work on non-union material (p. 410).

e. Union men could not work overtime on Saturday without permission of the union, no matter how serious the emergency (p. 411).

f. Detailed reports had to be made daily by union men to union headquarters, showing how many fixtures were set each day. Men who did more work than the standard set by the union were disciplined for their efficiency (p. 411).

g. No employer was allowed to stay on a job for more than two hours a day (p. 410).

h. The union could order as many men on a job as it saw fit, regardless of the wishes of the employer (p. 409).

i. Work could not be commenced on a job until the business agent of the union told how the job was to be done (p. 409).

The Painters' Union enforced the following:

a. No brush more than four inches in width could be used on or in any building (p. 439).

b. Roof painting with a sweep brush (a wide brush with a long handle) was prohibited and the work had to be done with a small brush (p. 439).

c. No union painter would paint non-union lumber (p. 440).

d. No union painter would use the labor saving device known as the paint gun or paint spray (p. 440).

The Plasterers' Union enforced the following:

a. Only one apprentice was permitted in each shop, regardless of the number of men employed in the shop or the size of the shop, and no additional apprentice was admitted until the first apprentice had served two years (p. 464).

b. Double time was demanded for Saturday work, including that done on Saturday morning (p. 464).

c. The use of labor saving devices such as the cement gun and of certain devices which would lower costs by permitting the use of cheaper material, were prohibited (p. 464).

These restrictions were typical of those imposed by the fifty odd unions in the building industry. But the greatest restriction was the closed shop restriction. It denied to the employer the right to employ a qualified worker, simply because he was not a member of a San Francisco labor union. It also denied to the qualified worker the opportunity of employment if he was not a

San Francisco union man. A union man from another locality could not obtain employment. He must be a member of a San Francisco union. Membership in a distant union was not sufficient. Nor could the newcomer overcome this by joining a union, for by reason of the cost and the conditions imposed, admission to the union was practically unattainable to the newcomer (pp. 435, 457).

It seems almost inconceivable that such conditions could exist or that the unions should be able to enforce or perpetuate them. But such was the case. The use of the strike and the boycott and economic pressure by the unions enforced their regulations. The slightest violation of these regulations by a contractor resulted in a strike, not only by the craft involved, but by every other craft employed by the contractor, not only in San Francisco, but in every other city in which he might have work (pp. 435, 438). The fifty building unions were confederated into a central organization, called the Building Trades Council, and acted in combination and concert in support of the demands of each of the industrial unions. As a consequence the building industry was under the control of the unions and as a result of their pressure the employers were compelled to sign agreements not to employ workers who did not belong to a local union—in other words, to maintain literally the "closed shop" (p. 435).

All this had its effect in increasing the cost of building and in discouraging building construction in San Francisco.

(b) Arbitration and Repudiation By Unions.

These were the conditions which existed in San Francisco early in 1921, at the time the history of this case begins.

On January 18, 1921, the Building Trades Council representing the unions, and the Builders Exchange, one of the defendants, representing the employers, entered into a written agreement of arbitration. This agreement was brought about through the activity of the Chamber of Commerce following several small strikes in the summer and fall of 1920. The arbitration agreement provided that the Board of Arbitration should sit as a continuing board to determine all disputes as to hours, wages and working conditions in the building trades (pp. 414-428).

The arbitrators were Archbishop E. J. Hanna, Roman Catholic Archbishop for San Francisco, M. C. Sloss, formerly an Associate Justice of the Supreme Court of California, and George L. Bell, an industrial expert.

The Board of Arbitrators commenced to function at once. There was first submitted to it for determination the question of the wage to be paid in various of the building crafts. After hearing and argument by the interested parties the board on March 31, 1921, made an award fixing a temporary wage scale for the succeeding six months. This wage scale was a slight reduction from the wages then being paid based upon the fact that wages had increased much more rapidly than the cost of living (p. 423).

On the day following the award the Building Trades Council challenged the jurisdiction of the board to

award a reduction in wages (p. 426). After discussion between the various parties, the board again on April 29, 1921, unanimously reaffirmed its decision (p. 427).

Thereupon, the Building Trades Council served notice on the Board of Arbitrators that it would not be bound by the decision decreasing wages, and declined to proceed further in the arbitration cases (p. 428).

As a result, the Board of Arbitration ceased to function (p. 428).

The members of the crafts affected by the ruling immediately struck and refused to work, thereby bringing building operations to a standstill (p. 436).

Some weeks were then spent in an endeavor to persuade the members of the striking unions to return to work, but without success (pp. 265, 436).

Thereupon large mass meetings of citizens were held under the auspices of the Chamber of Commerce. It was there resolved that building in San Francisco could not stop—that it must be continued and if necessary to effect that end, workers from other cities must be brought in (p. 436). Funds were subscribed and placed in the hands of a committee of the Chamber of Commerce. This committee proceeded to bring in workmen and bound itself to protect them against violence. These workers were assured of employment at the wage fixed by the Board of Arbitration, and were further assured that so long as they remained competent mechanics they would be protected in their right to earn a living during such time as they desired to reside in San Francisco. An appeal made to the entire com-

munity by the Chamber of Commerce was met by a general response, both of money and other assistance (p. 436).

(c) Establishment of "American Plan" By Builders Exchange.

The Builders Exchange, one of the principal defendants, is a corporation, incorporated in 1890 (p. 220). It has over a thousand members, composed of contractors engaged in the building trade and of dealers in building materials (p. 433). It engages in no business. There is the freest competition between its members. It does not fix prices. The objects of the Exchange as set forth in its By-laws, and as carried out in practice, were (pp. 222-238):

1. To provide quarters for its members.
2. To provide just and equitable methods of dealing as between its members and architects, engineers, owners and employees.
3. To acquire, preserve and distribute information among its members.
4. To foster the establishment and maintenance of fair and open bidding.
5. To foster the unrestricted development of proficient mechanics and competent and responsible masters in the respective trades.

The Builders Exchange and its members were aligned on one side of the labor controversy. They represented the employers of labor. On the other side were the Building Trades Council, and the unions, representing labor.

The conflict commenced. It was a battle for "closed shop" on the part of the unions, for "open shop" on the part of the employers. The employees had ammunition —their right to refuse to work. The employer on the other hand had ammunition. In this case the ammunition was building materials.

Labor refused to work for any employer who employed a worker who did not hold a union card—that is, for any employer who did not maintain a closed shop. The Builders Exchange and its members, on their part, refused to supply certain materials to employers who refused to employ a single non-union workman but who maintained the closed shop excluding all non-union men; they demanded as a condition to supplying the materials that the employer maintain the "American Plan".

The "American Plan" is a term invented in this industrial conflict to signify the fact that a competent workman would not be denied the right to work because of his membership or lack of membership in a labor, or any other organization. It signified that there was perfect freedom in the choice of workman and of employer. No restriction was made as to the number of union men that might be employed on any job, so long as employment was not refused to competent men who were not members of a labor union, simply because of this fact. As a practical demonstration of the fact that there was no discrimination, it was required that at least one non-union man be employed in each craft working on any particular job. All the remaining workers might be union men. The American Plan has

no requirement as to the proportion of union or non-union men that may be employed or that the foreman must be non-union (pp. 110, 136, 153, 395, 445, 453). No such requirements were ever adopted by the governing bodies of the Builders Exchange and no such regulations were ever made effective (pp. 395, 445).

(d) The Permit System.

On June 14, 1921, the Builders Exchange declared in favor of the American Plan, and proceeded to put into effect the so-called Permit System (p. 103). This was nothing more than a plan whereby the members of the Exchange were kept advised as to who was operating on the American Plan and who was not, in order that the members aligned in favor of the American Plan might be informed so that they would not sell certain materials to those who were aligned on the other side of the industrial conflict, that is, those who were operating on the closed shop principle. This plan gradually evolved into this procedure—contractors engaged in building were required to show that they were not operating on the closed shop basis before the members of the Builders Exchange would sell certain specified building materials to them. The mechanism finally evolved was for the person desiring to make the purchase to obtain a permit from the Builders Exchange for specific quantities of materials for use on a particular job, this being done to prevent the diversion of the materials to the unions for use on closed shop jobs. This machinery was rendered necessary by the large number of persons involved, and the difficulty of distinguishing friend from foe, save through a central bureau—the agent at the

Builders Exchange who issued the permits (pp. 438, 394-5-8, 452-3-4, 445).

(e) Local Nature of Permit System and Industrial Controversy.

The materials which were subject to the permit system were: cement, lime, plaster, ready mixed mortar, brick, terra cotta and clay products and sand, rock and gravel (pp. 112, 137, 445, 454). These materials with a few inconsiderable exceptions *are all produced in California* (pp. 454, 438). The choice of these materials was made for the specific purpose of preventing any question from arising as to interference with interstate commerce (p. 454).

The Industrial Relations Committee of the Builders Exchange in June, 1922 (more than ten months prior to the filing of the bill), recommended that lath, wallboard and Keene Cement (produced elsewhere) be added to the materials covered by the Permit System but this was never ratified by the Central Council, the Board of Directors or by a vote of three-fourths of the members of the Exchange at a meeting called for that purpose, as required by the by-laws of the Exchange (p. 236, sec. 13; p. 231, sec. 6), and *never went into effect. No permits were ever in fact required for these materials* (pp. 445, 454, 457).

It must constantly be borne in mind that the industrial conflict was confined to San Francisco and its immediate vicinity (pp. 79, 81, 327), that the participants are all located there, that all sales as to which permits were required were confined to San Francisco, and that no

permits were required for materials to be used outside the strike area (pp. 81, 327). As to materials to be used outside the strike area, there were no requirements, union men and closed shop contractors could purchase all the materials they desired. Similarly as to materials coming directly from without the state, there were no restrictions of any kind and no permits were required (pp. 451-4-5, 331, 462-3-7, 466).

(f) The Industrial Association.

The Industrial Association, the other principal defendant, is a voluntary association, composed of several thousand members from every walk in life, lawyers, doctors, professional men, as well as business men. Over forty different lines of professional and business activities are represented in its membership (p. 434).

The Industrial Association was formed on November 8, 1921, and shortly thereafter took over the work which had, up to that time, been performed by the Chamber of Commerce (pp. 238-253). The Association has attempted to represent the public in this industrial conflict. The objects of the Association as set forth in its charter are to promote the happiness and prosperity of the people of San Francisco, and to that end it commits itself to the following basic principles:

1. The right of any person to seek, secure and retain work for which he is fitted, and the right of the employer to engage or dismiss employees, should not be abridged or denied because of membership or lack of membership in any organization or association of any kind.

2. Efficiency in Industry—This should be created and maintained to enable our enterprises to cope with those of other places. Superior skill and industry in work should be permitted to earn an adequate reward. The establishment of this principle, however, is not to be used to reduce the earnings of a less able man below a fair return for the work done. No artificial limit or restriction should be placed upon the normal production of any man or upon the use of any appliance, invention or other means to increase output, always having due regard for the health, safety, and well-being of the individual.

3. The right of management is inseparable from responsibility for industrial results. Therefore, the right of the employer to engage or dismiss men individually on merit must not be circumscribed; the right on all occasions, however, to be exercised only upon broad principles of justice, and with a recognition of the obligation on the part of management to co-operate with the employee in securing so far as possible continuous employment.

4. No understanding should be reached between employers and employees that ignores the public interest, and no agreement should be tolerated that is illegal or contrary to sound public policy, whether made between employers themselves or with their employees or others.

The Association engaged in no business. It did not fix prices. The freest competition was indulged in between its members (pp. 434, 152).

The Industrial Association was active in the strike, carrying out the engagements previously made by the Chamber of Commerce—to protect workmen against violence, to prevent discrimination against qualified workmen because of membership or non-membership in labor unions, and to keep building in progress (p. 439). Among its activities was that of training apprentices. Through the refusal of the unions to permit apprentices in any substantial numbers, there was a shortage of skilled workmen in San Francisco. The Industrial Association established trade schools where boys and men could learn the plastering, plumbing and other trades. As a result, the supply of labor soon began to increase and more nearly to approach the demand. In two years the Association trained more than 1100 apprentices to become proficient in various useful trades, without expense to the students, the cost of instruction being met by the Industrial Association (p. 439).

(g) Termination of General Strike: Renewed Strikes By Plumbers and Other Trades.

The general strike, commenced after the award of the Arbitration Board in April, 1921, was practically over in September, 1921 (p. 436). At that time all the building trades with the exception of the granite workers, were back at work, although no formal end of the strike had been proclaimed. To all intents and purposes, the in-

dustrial war was over. The permit system was practically discontinued and all was quiet in San Francisco.

But the war was not over for long. It was an armistice, rather than a peace. After quiet for the period from September, 1921, until March, 1922, it broke out afresh, but in a greatly restricted way. In March, 1922, ninety per cent of the plumbers employed in San Francisco were members of the union. Ten per cent did not hold the union card. The Plumbers' Union was considered as the strongest, most powerful and wealthiest union in the building trades. In March, 1922, the Plumbers' Union served upon their employers a demand that all non-union men be discharged and that all plumbing work thereafter be conducted on a closed shop basis. There was no question of wages or working conditions—the demand was merely that all non-union men be discharged (p. 437). This was considered as the entering wedge in an attempt to re-establish the "closed shop" in the building industry in San Francisco.

The demand of the plumbers was soon followed by a similar demand by the plasterers and the bricklayers (p. 437). These demands were not only enforced by a strike, but by a boycott, the boycott being carried to the extent of striking on jobs far removed from San Francisco because the employer employed non-union men in San Francisco (p. 438).

This outbreak was accompanied by many acts of violence in which non-union men were molested, harassed, insulted and beaten, and property on which non-union men were employed was wantonly destroyed or damaged (pp. 437-8). As an accompaniment to strikes in

the past, it had been the practice of the unions to boycott various building materials, such as cement, lime, plaster, mortar, and plumbing materials, and at times such materials were forced off the local market (p. 438).

To meet this situation of strike, demand for the closed shop, violence and threatened boycott, the Builders Exchange representing the employers, again put into effect its permit system covering building materials produced in California, and no such materials were sold to any person who enforced the closed shop in San Francisco, that is, who refused to employ workers merely because they were not members of a union (pp. 438, 107).

(h) Refusals By Plumbing Supply Houses to Sell Materials and Later Abandonment of This Practice.

Shortly after the commencement of the plumbers strike certain houses engaged in the business of selling plumbing materials in San Francisco, in order to protect themselves against boycott and blacklist by the strikers, refused to sell their materials to the unions, their agents or confederates (p. 157). That is, the material men directly involved in the plumbing strike refused to sell to the strikers or those conspiring with them in their attempt to enforce the closed shop (pp. 60, 197). These refusals by the plumbing material houses to sell are entirely separate and independent of the Permit System. They did not take place until more than a year after the Permit System was put into effect, different parties were involved and there was no connection either in plan or operation with the Permit System.

The evidence shows that in some instances some of the plumbing supply houses refused to sell materials to plumbers who were operating on the "closed shop" basis (pp. 60, 169-204). In no case does the evidence show a refusal to make an *interstate* sale. In every case of a refusal to sell, and the refusals shown by the record are few in number, it was shown that the materials sought to be purchased were in the bins or on the shelves of the particular supply house, and that these goods were no longer the subject of interstate commerce. We repeat that in so far as this phase of the case is concerned, that is, that part having to do with the sale of plumbing supplies, there was no connection between it and the so-called permit system. The permit system never covered plumbing supplies.

THE REFUSALS OF PLUMBERS' SUPPLY HOUSES TO SELL THEIR MATERIALS FOR USE ON CLOSED SHOP JOBS IN SAN FRANCISCO CEASED IN NOVEMBER, 1922, SIX MONTHS BEFORE THE BILL OF COMPLAINT WAS FILED (pp. 61, 85, 158, 190). THESE PLUMBERS' REFUSALS ARE THEREFORE OF NO IMPORTANCE IN THIS CASE AND MAY BE DISREGARDED.

Though the plumbers' supply houses had discontinued their refusals to sell to those seeking to re-establish the closed shop after November, 1922, it is not claimed that the Permit System of the Builders Exchange was abandoned. On the contrary, it was in force at all times, including the period when the plumbing supply houses were refusing to sell their goods to the closed shop people. But it was never at any time applied to plumbing supplies. In other words the Builders Ex-

change confined its Permit System to cement, lime, plaster, rock, sand, gravel and clay products, all state produced materials. Under this system, while such materials could not be purchased for use in San Francisco by those refusing to conform to the American Plan, there was no restriction whatever, after November, 1922, upon the purchase by anyone of plumbers' supplies, irrespective of their economic beliefs or practices.

Considerable space is devoted in the transcript to this matter. This was caused by the introduction in evidence of the transcript of testimony taken in the earlier case in the State court under the State Anti-Trust Act, in which the defendants were acquitted. Just prior to the filing of the information in the State court, there had been refusals to sell on the part of plumbers' supply houses, and for that reason much testimony on this point was introduced. Such evidence has no importance in this case, as is shown by the fact that it was ignored in the opinion and decree of the District Court. It merely shows a practice which had been abandoned six months before this suit was instituted. It is elementary that no injunction will issue under such circumstances.

United States v. United States Steel Corporation, 251 U. S. 417.

(i) Legal Proceedings Against Defendants.

More than two years after the struggle between the unions and the employers had commenced, more than two years after the permit system had been put into effect,

and many months after the plumbing supply houses had refused to sell to certain plumbers, this suit was commenced by the United States. The complaint was filed May 26, 1923. The decree was entered on December 19, 1923. During the long period preceding the filing of the complaint, the tide of industrial battle had ebbed and flowed. The general building strike was over in September, 1921, almost two years before the complaint was filed; only three unions, the Plasterers', the Plumbers' and the Painters', were on strike. In the plumbers' craft, ninety per cent of the men were union men and ten per cent were non-union. When the conflict was practically over, then, and not till then was this complaint filed.

In the course of the conflict the unions caused the arrest of certain of the defendants on the charge that they had violated the Cartwright Act. This is a Statute of California (Stats. of California, 1907, p. 984; amended, Stats. of California, 1909, p. 593) somewhat in the language of the Anti-Trust Act, covering the same subject matter, but from the standpoint of the State and looking to restraint of intrastate commerce as contrasted with interstate commerce. After a trial, the defendants were acquitted. The information in the Cartwright case was filed December 12, 1922, and the defendants were acquitted on May 9, 1923. It was after the State had refused to find that the defendants had restrained intrastate commerce that this suit was commenced by the United States in the United States District Court.

(j) Results of Establishment of American Plan on Industry.

When the conflict was over the conditions in San Francisco were:

1. The American Plan was in effect in the building industry, and any qualified workman could obtain work whether he was a member of a union or not.

2. The unreasonable restrictions on the training of apprentices no longer existed, and any willing boy could learn a trade.

3. The unreasonable and uneconomic restrictions on the use of mechanical labor saving devices and the limitation of the amount of work a man could do, were a thing of the past.

4. Building increased and commerce thrived. The building permits were:

Year	No. of Permits	Value
1920	5620	$26,729,992
1921	6313	22,244,672
1922	8038	45,327,239
1923 (first 9 mo.) (p. 432).	7415	34,109,996

The tonnage of shipping that arrived and departed was:

1921, 20,703,041 tons, cargo value $994,227,353.00;

1922, 45,363,176 tons, cargo value $1,976,133,506.00 (p. 433).

These were to a large extent the results of the activities of these defendants for which they are before this court on a charge of violating the Anti-Trust Act.

It is only proper to say in passing that the complainants attempted to show certain specific cases where interstate sales had been refused. These alleged instances are few in number, not to exceed ten, and are spread through the two-year period preceding the filing of the suit. It is the contention of these defendants that these alleged refusals to sell were not connected with the industrial controversy, and did not concern it or the defendants, but were cases of individual action by certain defendants, not for the purpose of affecting the industrial conflict, but for personal trade reasons. These instances will be dealt with later, and the evidence respecting them will be examined for the purpose of showing that they have no importance or significance in this case or any connection with the defendants.

Summary of Facts.

1. San Francisco was the scene of an industrial conflict.

2. The unions, to enforce the "closed shop" in the building industry, declared a general strike.

3. The defendants, thereupon, determined to establish the "American Plan", that is, the open shop, where no discrimination against workmen would be permitted by reason of membership or lack of membership in a labor union.

4. In furtherance of their aims, the members of the Builders Exchange refused to continue selling for use in San Francisco certain state produced materials to

the unions, or those acting in concert with them. To prevent confusion, permits issued by the Builders Exchange were required for such building materials. Small quantities of lime and plaster produced outside the state, were also under the Permit System, but in every instance the lime and plaster was in the warehouses in San Francisco at the time of the refusal to sell.

5. No permits were required save for sales in San Francisco of specified materials for building jobs in San Francisco and its immediate vicinity. All sorts of building materials and supplies were procurable at other places in California, and throughout the United States, without the requirement of Permits, and no Permits were required for any materials other than cement, lime, plaster, ready mixed mortar, brick, terra cotta and clay products and sand, rock and gravel, sold by the defendants.

6. There was no fixing of prices. There was no restriction of competition. Membership in the defendant associations was open and free to any person who desired to join, provided he would subscribe to their by-laws and principles. The defendants were all direct parties to the industrial conflict and the persons to whom they refused to sell were also direct parties to the conflict. Interstate commerce was not directly affected and the volume was not lessened. The acts of the defendants were legal and peaceful.

7. During the period in question there was increased activity in building, in trade, and in commerce. Since the termination of the industrial controversy there has

been no discrimination in the building industry in San Francisco against qualified workmen on account of membership or lack of membership in labor unions.

Argument.

I.

THE DECREE SHOULD BE REVERSED FOR THE REASON THAT THE EVIDENCE DOES NOT SHOW ANY VIOLATION OF THE ANTI-TRUST ACT.

Do the acts of the defendants constitute a contract, combination or conspiracy in restraint of interstate trade and commerce, and do they amount to a violation of the Anti-Trust Act?

The evidence shows that certain of the defendants, participants in a local industrial controversy, refused to sell certain state-produced materials and certain supplies which had ceased to be articles in interstate commerce, to those aligned on the opposite side of the industrial controversy; that such refusals were made in San Francisco; that the materials were to be used in San Francisco and vicinity; that there was no intent to affect interstate commerce, to fix prices or to stifle competition, and that the refusals had in fact no such effect.

The defendants contend that this evidence does not establish a violation of the Act for the following reasons:

1. The agreement was not intended to restrain interstate trade; it was not intended to fix prices or restrain competition; it had no commercial or trade *purpose*.

2. Its *effect* on interstate commerce was secondary, remote, incidental and slight, if there was any effect at all.
3. The situs and effect of the restraint, if any, were local.
4. The defendants were themselves direct participants in the industrial controversy and committed no unlawful acts.
5. The restraint upon interstate commerce, if any, was not unreasonable.

The evidence clearly shows these to be the facts. What is the law to be applied to these facts?

(a) Discussion of the Meaning and Application of the Anti-Trust Act, as Determined by the Cases in This Court.

PARTICIPANTS IN AN INDUSTRIAL CONFLICT, CONFINED TO A SINGLE CITY AND VICINITY, MAY REFUSE TO SELL BUILDING MATERIALS IN THAT CITY, TO THEIR OPPONENTS FOR USE IN THAT CITY, AND IF THERE IS NO INTENT TO RESTRAIN INTERSTATE COMMERCE, AND IF ANY EFFECT THEREON IS SLIGHT, INCIDENTAL AND REMOTE, THERE IS NO VIOLATION OF THE ANTI-TRUST ACT.

Article 1, Section 8, of the Constitution grants to Congress the power "to regulate commerce with foreign nations and among the several states and with the Indian Tribes". In the exercise of this delegated power, Congress enacted the Anti-Trust Act (26 Stat. 209).

The applicable provision of the Act reads:

"Section 1. Every contract, combination, in the form of trust or otherwise, or conspiracy, in re-

straint of trade or commerce among the several states is hereby declared to be illegal."

Though by the terms of the Act every combination or conspiracy in restraint of trade and commerce among the several states is declared illegal, as interpreted by the decisions of this court, the Act condemns only those combinations which *directly and unduly* restrain interstate commerce.

American Column and Lumber Co. v. United States, 257 U. S. 377-400;

In *United States v. Union P. R. Co.*, 226 U. S. 61, 87, the law was condensed into this expression:

"To preserve from undue restraint the free action of competition in interstate commerce was the purpose which controlled Congress in enacting this statute, and the courts should construe the law with a view to effecting the object of its enactment."

To come within the inhibitions of the Act, we must therefore find:

1. A restraint of interstate commerce;
2. A direct restraint of that commerce; and
3. An undue restraint of that commerce.

In order, however, to determine whether given acts do or do not fall within the forbidden sphere, it is necessary to determine the meaning of the words "directly", "unduly" and "interstate commerce".

The court was early met with the difficult duty of defining the scope of the Act. The first time the question was presented was in the *Knight* case in 1895 (*United States v. Knight*, 156 U. S. 1). There the defendants purchased sugar refineries in the State of Pennsylvania. The bill charged that the agreements under which these purchases were made constituted combinations in restraint of interstate commerce. The court held that the purchase of the refineries did not constitute a violation of the Act. It based its decree upon two grounds, (1) that the manufacture of sugar in Pennsylvania was not interstate commerce, and (2) that the purchase of the refineries in Pennsylvania did not have a direct effect on interstate commerce. The court recognized that a line had to be drawn at some point between commerce and manufacture, and between state commerce and interstate commerce. It said (156 U. S. 16):

> "It was in the light of well settled principles that the Act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such; or to limit and restrict the rights of corporations created by the states or the citizens of the states in the acquisition, control, or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the states of their residence or creation sanctioned or permitted. Aside from the provisions applicable where Congress might exercise municipal power, what the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several states or

with foreign nations; but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia Refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the states or with foreign nations. The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. * * * There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree."

Probably if the Government had averred and proved in this case that the purpose of the purchase of the Philadelphia refineries was only a step in a great scheme to monopolize the business of selling refined sugar among the states, the decision of the court would have been different. *Taft: The Anti-Trust Act and the Supreme Court,* p. 82.

It has been intimated that the *Knight* case with respect to the first point involved is very near the line (*Swift & Co. v. United States,* 196 U. S. 375). This may well be, but the *Knight* case does announce a proposition with regard to the second ground involved which has ever since been followed, namely, that, in order to constitute a violation of the Act the restraint must be direct, and a necessary consequence or a primary end of the acts complained of. Despite the criticism of the *Knight* case, the court has frequently relied upon the distinction pointed out in that case between manufacture and commerce. Thus in the *Coronado* case

(*United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344) importance is given the fact that coal mining is not commerce, and in the *Herkert* and *Meisel* case (*United Leather Workers v. Herkert & Meisel Trunk Co.*, 265 U. S. 457) that manufacture is not commerce.

In the *Swift* case (*Swift & Co. v. United States*, 196 U. S. 375 (1905)), the court held that the defendants had violated the Act by agreeing not to bid against each other in the live stock markets, to bid up prices and to fix selling prices, all with the intent to monopolize interstate commerce and prevent competition. It was urged by the defendants that the sale and delivery of the cattle at the various stockyards, and their subsequent slaughter and preparation, was each in and of itself not an act of interstate commerce, and therefore not within the Act. The court, in disposing of this contention, said, p. 396:

> "It is suggested that the several acts charged are lawful, and that intent can make no difference. But they are bound together as parts of a single plan. The plan may make the parts unlawful. *Aikens v. Wisconsin*, 195 U. S. 194. The Statute gives this proceeding against combinations in restraint of commerce among the states and against attempts to monopolize the same. Intent is almost essential to such a combination, and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent,—for instance, the monopoly,—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Com. v. Peaslee*, 177 Mass. 267; 59 N. E. 55. But when that intent and the consequent dangerous probability

exist, this statute, like many others, and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result."

And again:

"Although the combination alleged embraces restraint and monopoly of trade within a single state, its effect upon commerce among the states is not accidental, secondary, remote, or merely probable. On the allegations of the bill the latter commerce no less, perhaps even more, than commerce within a single state, is an object of attack. * * * Moreover, it is a direct object; it is that for the sake of which the several specific acts and courses of conduct are done and adopted. Therefore the case is not like *United States v. E. C. Knight Co.*, 156 U. S. 1, where the subject matter of the combination was manufacture, and the direct object monopoly of manufacture within a state. However likely monopoly of commerce among the states in the article manufactured was to follow from the agreement, it was not a necessary consequence nor a primary end. Here the subject matter is sales, and the very point of the combination is to restrain and monopolize commerce among the states in respect to such sales. The two cases are near to each other, as sooner or later always must happen where lines are to be drawn, but the line between them is distinct."

In the *Swift* case, the court marks the line. It is somewhere between the *Knight* case and the *Swift* case. The specific acts in both cases were done within a single state—but in the *Knight* case the subject matter is manufacture; in the *Swift* case it is commerce. In the *Knight* case no intent to restrain commerce is shown; in the *Swift* case the intent, and the "dangerous probability" is manifest. In the *Knight* case the effect on

interstate commerce was problematical; in the *Swift* case the effect was not "accidental, secondary, remote or merely probable"—it was direct.

The *Swift* case stands for this proposition: In order that acts performed within a single state may constitute a violation of the Anti-Trust Act, there must exist (a) an "intent" to restrain interstate commerce plus the "dangerous probability" that such commerce will in fact be restrained by the acts done, or (b) a "direct" effect upon such commerce from said acts (one not "accidental, secondary, remote or merely probable").

The meaning of "direct" is further illustrated in the *Hopkins* case and in the *Anderson* case. In those cases commerce, as such, was not the object, or indeed the subject, of the combination, and again we find the court refusing to say that the admitted incidental and remote restraint brought the defendants within the prohibition of the Act.

In the *Hopkins* case (*Hopkins v. United States*, 171 U. S. 578 (1898)), the defendants were engaged as commission men in buying and selling cattle at the Kansas City stockyards. Most of the cattle came from states other than Missouri, and after sale were shipped to still other states. The defendants were members of the Kansas City Livestock Exchange, and, in accordance with the rules of the Exchange, refused to deal with any person who was not a member of the Exchange. It was claimed that as a result, one who was not a member of the Exchange was prevented from doing business at Kansas City, that is, from enjoying the facilities of the

market which were enjoyed by members. The defendants showed that the Association engaged in no business; did not fix prices; that there was the freest competition between members and that anyone could become a member by accepting and agreeing to be bound by the by-laws.

The court held that the defendants had not violated the Act. The decision is based upon two grounds, (1) that the defendants were not engaged in interstate commerce, and (2) that any effect on interstate commerce was indirect and remote.

The court says (p. 592):

> "The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce which is interstate * * *."
>
> "There must be some direct and immediate effect upon interstate commerce in order to come within the Act."

And again at p. 594:

> "An agreement may in a variety of ways affect interstate commerce, just as state legislation may, and yet, like it, be entirely valid, because the interference produced by the agreement or by the legislation is not direct."

And at p. 600:

> "The Act of Congress must have a reasonable construction or else there would scarcely be an agreement or contract among business men, that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it. We have no idea that the Act covers or was intended to cover such kinds of agreements."

The acts of the defendants admittedly had some effect upon interstate commerce. Interstate commerce, however, was neither the *subject* nor the *object* of their agreement. The defendants were interested in a local, personal concern, the proper conduct of their business as commission men in Kansas City. They were not thinking of interstate commerce, and had no commercial end in view. In the present case also we have a *local* agreement, not directed toward interstate trade, having a non-commercial object, and only indirectly affecting interstate commerce.

The *Hopkins* case was the subject of comment in the *Swift* case. In distinguishing the case, the court in the *Swift* case (196 U. S. 397), said:

> "So again the line is distinct between this case and *Hopkins v. United States,* 171 U. S. 578. All that was decided there was that the local business of commission merchants was not commerce among the states, even if what the brokers were employed to sell was an object of such commerce. The brokers were not like the defendants before us, themselves the buyers and sellers. They only furnished certain facilities for the sales. Therefore, there again the effects of the combination of the brokers upon the commerce was only indirect, and not within the Act. Whether the case would have been different if the combination had resulted in exorbitant charges was left open."

The line of demarcation between the *Swift* case and the *Hopkins* case is plain. In the *Swift* case the subject of the agreement was interstate commerce; in the *Hopkins* case it was the regulation of a local commission business. In the *Swift* case the object of the combination was the restraint of interstate commerce;

in the *Hopkins* case it was the regulation of local business and rules of trading. In the *Swift* case the effect on interstate commerce was direct; in the *Hopkins* case it was "accidental, secondary, remote or merely probable".

In the *Anderson* case (*Anderson v. United States,* 171 U. S. 604 (1898)), the facts were very similar to those in the *Hopkins* case, save that unlike the *Hopkins* case, the defendants were themselves the buyers and sellers and not merely commission men. They were members of an association, which by its rules prohibited members from dealing with non-members. It was proved that the Association engaged in no business, did not fix prices, that there was the freest competition among its members, and that anyone could join by agreeing to be bound by the rules, one of which was a prohibition against dealing with a non-member. It was urged in behalf of the defendants that they were not engaged in interstate commerce. The court, however, refused to pass upon this point, stating that in its opinion it was immaterial whether or not the defendants were engaged in interstate commerce.

In holding that the defendants had not violated the Act, the court said (171 U. S. 615):

> "It has already been stated in the Hopkins case, above mentioned, that in order to come within the provisions of the statute the *direct effect* of an agreement or combination must be in restraint of that trade or commerce which is among the several States, or with foreign nations. Where the subject matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the

purpose of the agreement was not to regulate, obstruct or restrain that commerce, but that it was entered into with the *object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged,* such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object. As is said in *Smith v. Alabama,* 124 U. S. 465, 473: 'There are many cases, however, where the acknowledged powers of a State may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations.' The same is true as to certain kinds of agreements entered into between persons engaged in the same business for the direct and bona fide purpose of properly and reasonably regulating the conduct of their business among themselves and with the public. If an agreement of that nature, while apt and proper for the purpose thus intended, should possibly, though only indirectly and unintentionally, affect interstate trade or commerce, in that event we think the agreement would be good. Otherwise, there is scarcely any agreement among men which has interstate or foreign commerce for its subject that may not remotely be said to, in some obscure way, affect that commerce and to be therefore void. We think, within the plain and obvious construction to be placed upon the Act, and following the rules in this regard already laid down in the cases heretofore decided in this court, we must hold the agreement under consideration in this suit to be valid." (Italics ours.)

The *Anderson* case was also the subject of comment in the *Swift* case, where it was said (196 U. S. 398):

"In *Anderson v. United States,* 171 U. S. 604, the defendants were buyers and sellers at the stock yards, but their agreement was merely not to employ brokers, or recognize yard-traders, who were not members of their Association. Any yard trader could become a member of the Association on complying with the conditions, and there was said to be no feature of monopoly in the case. It was held that the combination did not directly regulate commerce between the states, and, being formed with a different intent, was not within the act."

The difference between the *Swift* and the *Anderson* cases is plain. In the two cases there were different objects, different subjects, a different effect. In the *Swift* case the subject of the agreement was interstate commerce, the object was the restraint of interstate commerce, there was a direct effect on interstate commerce. In the *Anderson* case the subject and the object were not interstate commerce, but the regulation of methods of dealing between the members of the Association, the effect on interstate commerce was "accidental, secondary, remote or merely probable".

In the *Anderson* case persons engaged in interstate commerce (for the court says that if the defendants were engaged in interstate commerce its decision would be the same) agree among themselves not to deal with any person not a member of the Association; that is, they refuse to buy from or sell to anyone who does not subscribe to their principles of doing business. The similarity between the *Anderson* case and the case at bar is striking. In both the situs of the transaction is local; neither the object nor the subject is interstate commerce; there is no fixing of prices, no elimination of

competition, all persons may join the associations by agreeing to their rules.

Thus far we have shown that the court has limited the application of the Act to agreements which exercise a direct effect upon interstate commerce and where the intent or "dangerous probability" is to restrict that commerce.

(b) The Labor Cases Under the Anti-Trust Act.

The principles marking the limits of direct and undue restraint of interstate commerce receive further illustration from a consideration of the cases in this court under the Anti-Trust Act dealing with labor disputes, a group which may conveniently be termed the Labor Cases, namely: *Loewe v. Lawlor, Duplex v. Deering,* the *Coronado* case and the *Herkert & Meisel* case.

These cases may be conveniently grouped under the designation of Labor Cases for the reason that they arose, as does the case at bar, out of labor controversies. This fact is of importance for several reasons. In the first place, the participants in a labor controversy are not engaged in commercial activities, and their minds are not on trade and commerce. They are trying to win a war that has for its object something entirely different from trade and commerce. In the second place, the usual effect of a labor war upon interstate commerce is remote, incidental and secondary. That does not mean that the participants may not in some cases in the heat of conflict, change the immediate object and subject of their activities to interstate commerce. When they do, we have cases like *Loewe v. Lawlor* and *Duplex Co. v.*

Deering. But in the ordinary labor controversy we start out, at least, with something which has interstate commerce neither for its object nor its subject.

In the so-called *Danbury* case (*Loewe v. Lawlor*, 208 U. S. 274, (1908)), the plaintiffs manufactured hats at a factory in Connecticut, and sold the product generally throughout the United States, by far the largest part of the product being sold outside of Connecticut. The defendants were employees of plaintiffs who had struck to enforce their demands that the plaintiffs unionize their factories. The bill alleged that the defendants had conspired for the direct purpose of destroying plaintiffs' interstate trade by means of intimidation of and threats made to such manufacturers and their customers in the several states, of boycotting them, their product and their customers, until such time as from the damage and loss of business resulting therefrom the plaintiffs should yield to the demand to unionize their factories.

The court in holding that the bill alleged acts on the part of the defendants constituting a violation of the Act, said (p. 300):

> "The averments here are that there was an existing interstate traffic between plaintiffs and citizens of other States, and that, for the direct purpose of destroying such interstate traffic, defendants combined not merely to prevent plaintiffs from manufacturing articles then and there intended for transportation beyond the State, but also to prevent the vendees from reselling the hats which they had imported from Connecticut, or from further negotiating with plaintiffs for the purchase and intertransportation of such hats from Connec-

> ticut to the various places of destination. So that, although some of the means whereby the interstate traffic was to be destroyed were acts within a state, and some of them were, in themselves, as a part of their obvious purpose and effect, beyond the scope of Federal authority, still, as we have seen, the acts must be considered as a whole, and the plan is open to condemnation, notwithstanding a negligible amount of intrastate business might be affected in carrying it out. If the purposes of the combination were, as alleged, to prevent any interstate transportation at all, the fact that the means operated at one end before physical transportation, commenced, and, at the other end, after the physical transportation ended, was immaterial.
>
> "Nor can the act in question be held inapplicable because defendants were not themselves engaged in interstate commerce. The act made no distinction between classes. It provided that 'every' contract, combination, or conspiracy in restraint of trade was illegal. The records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the act, and that all these efforts failed, so that the act remained as we have it before us."

In *Loewe v. Lawlor* the strikers to attain their ends, directly conspired to interfere with and obstruct plaintiffs' interstate trade and their activities achieved the intended result. In other words, instead of devoting their attention to the immediate subject of the controversy with their employers, the question of unionizing their shops, the strikers intentionally entered into an agreement to destroy the interstate commerce of their employers and carried it out with such success as to destroy that interstate commerce. The primary object of their activities shifted from the fixing of working

conditions over to an interference with their opponents' interstate commerce. No more direct interference with interstate commerce could very well be imagined than in this case where the strikers set out intentionally to destroy the interstate commerce of their employers.

As to the degree of interference the court points out that it was primarily an attack upon interstate commerce, though a negligible amount of intrastate business might be affected.

The court commented on the *Knight,* the *Hopkins* and the *Anderson* cases as follows (p. 297):

> "We do not pause to comment on cases such as United States v. E. C. Knight Co., 156 U. S. 1; Hopkins v. United States, 171 U. S. 578, and Anderson v. United States, 171 U. S. 604, in which the undisputed facts showed that the *purpose* of the agreement was not to obstruct or restrain interstate commerce. *The object and intention of the combination determined its legality.*" (Italics ours.)

Loewe v. Lawlor stands for the proposition that in a labor controversy, if the strikers in an attempt to win, *intentionally* attempt to destroy the interstate commerce of their employers, and to that end engage in a *country-wide* conspiracy, they must be held to violate the Act. We have, in *Loewe v. Lawlor,* an agreement which has *interstate commerce* for its *direct* subject, and an intent to *destroy* it as its *direct* object. It is worthy of note that the agreement complained of included a secondary boycott, directed against persons who were not the immediate participants in the strike. It is difficult to imagine a case which comes more clearly within the Act.

The next labor case is *Duplex Co. v. Deering*, 254 U. S. 443 (1921). The plaintiff in this case was engaged in the manufacture of printing presses in Michigan. These presses were sold almost exclusively in states other than Michigan, being shipped to the place of ultimate use in parts, and there erected. The presses were large and complicated and required expert labor both in erection and repair. The defendants, who were not connected in any way with the plaintiff declared a strike at plaintiff's works in an attempt to unionize the workers, few of whom were members of the union. Only a few of the workers responded to the strike call and the plaintiff continued to manufacture presses. Thereupon defendants who were in New York declared and enforced a country-wide boycott of plaintiff's presses, threatening purchasers with loss and sympathetic strikes if they purchased from plaintiff, refusing to repair or erect presses and inciting persons engaged in transporting presses to strike. The acts were such as to prevent any commerce in plaintiff's presses.

The court held that the defendants had violated the Act, for they combined with the direct intention of destroying the interstate commerce of plaintiff and had succeeded in destroying that commerce.

The case resembles *Loewe v. Lawlor*, in that an intentional attempt is made to destroy the interstate commerce of the employer; the agreement involved an intent to destroy interstate commerce as its direct and primary object.

A labor case which falls upon the other side of the line from *Loewe v. Lawlor* and *Duplex Co. v. Deering*,

is the *Coronado* case (*United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344). In this case the Coronado Coal Company operated a mine in Arkansas. Bache, the manager, determined to run the mine, after a certain date, upon a non-union or open shop basis. For this purpose he shut down the mine, intending to open it on a certain date as a non-union mine. Certain of the defendants, who were officers and members of the local miners union, declared a strike. In furtherance of their strike the guards at the mine were assaulted, property was destroyed, and in an attack on the mine several persons were killed. As a result of this activity on the part of the defendants the mine being unable to produce any coal was prevented from sending it out into interstate commerce.

The court held that the acts of the defendants did not constitute a violation of the Act, for the reason that it was necessary to establish that the acts of defendants were (p. 403) "with intent to restrain interstate commerce and to monopolize the same and to subject it to the control of the union".

The court held that coal mining was not interstate commerce (*Knight* case) and that Congress had not undertaken to regulate it as such (p. 408):

> "It is clear from these cases that if Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain, or burden it, it has the power to subject them to national supervision and restraint. Again, it has the power to punish conspiracies in which such practices are part of the plan to hinder, restrain, or monopolize interstate commerce. But in the latter case, the *intent to injure, obstruct, or restrain*

> *interstate commerce must appear* as an obvious consequence of what is to be done, or be shown by direct evidence or other circumstances." (Italics are ours.)

The court distinguished *Loewe v. Lawlor* on the ground that "the direct object of the attack was interstate commerce". *Eastern States Retail Lumber Dealers' Association v. United States,* 234 U. S. 600, was also distinguished on the ground that in that case "it was the commerce itself which was the object of the conspiracy".

With respect to the contention that the obstruction of coal mining necessarily restrained interstate commerce, the court said (p. 411):

> "And so in the case at bar,—coal mining is not interstate commerce, and obstruction of coal mining, though it may prevent coal from going into interstate commerce, is not a restraint of that commerce unless the obstruction to mining is intended to restrain commerce in it, or has necessarily such a direct, material, and substantial effect to restrain it that the intent reasonably must be inferred."

Emphasis was laid on the fact that the strike and the lawlessness were local, (p. 411) "local in its origin and motive, local in its waging and local in its felonious and murderous ending". The court indicates that the product of the mines in question, about 5,000 tons a week, an inconsiderable amount in proportion to total production, could have no appreciable effect upon the price of coal or non-union competition. In conclusion the court stated that the evidence did not show that the

acts of the defendants "were committed by them in a conspiracy to restrain or monopolize interstate commerce".

In the *Coronado* case the interference with interstate commerce went so far as to involve the burning of a car loaded with coal destined for transportation and actually billed to purchasers in another state. Yet the court disposed of the argument that this conduct indicated a direct interference with interstate commerce by pointing out, (1) that no general purpose existed to impede commerce, and (2) that the car was used by the operator's guards during the riot as a defense and "its burning was only a part of the general destruction" (259 U. S. at p. 411).

The Chief Justice said:

> "In the case at bar there is nothing in the circumstances or the declarations of the parties to indicate that Stewart, the president of District No. 21, or Hull, its secretary-treasurer, or any of their accomplices, *had in mind interference with interstate commerce or competition* when they entered upon their unlawful combination to break up Bache's plan to carry on his mines with non-union men. *The circumstances were ample to supply a full local motive for the conspiracy.*" (Italics are ours.)

And again:

> "The circumstance that a car loaded with coal and billed to a town in Louisiana was burned by the conspirators has no significance upon this head. The car had been used in the battle by some of Bache's men for defense. It offered protection, and its burning was only a part of the general destruction."

A second case involving the same acts which were the subject of consideration in the *Coronado* case but brought by another mining company is

> *United Mine Workers of America v. Pennsylvania Mining Company,* 300 Fed. 965 (C. C. A. 8th Circuit, July 12, 1924).

It was attempted in that case to differentiate the *Coronado* case on the ground that an attempt made to blow up a railroad bridge on the spur track of the Missouri Pacific Railway Company might be distinguished from the destruction of the loaded railroad car in the earlier case, on the ground that the car was used by the operator's men for defense. Counsel for the Pennsylvania Mining Company argued that while the destruction of the car might be regarded as incidental, the attempted destruction of the bridge was a direct attempt to restrain interstate commerce. The Circuit Court of Appeals recognized that there was some difference in the two situations, but held that

> "the attempted blowing up of the bridge was a part of the general destructive tactics employed, the same as the destruction of the car in the Coronado case. And while it bears on the question, of course, of intent, it is hardly adequate in itself to establish the direct intent upon the part of the alleged conspirators to restrain interstate commerce."

In

> *Finley v. United Mine Workers of America,* 300 Fed. 972, 979 (C. C. A. 8th Circuit), July 12, 1924,

the plaintiffs attempted to show that not only had the car used for defense in the *Coronado* case been destroyed in the riot by the strikers, but that others had been burned, and that this had been done by independent attacks of the rioters. The Circuit Court of Appeals again adopted the views expressed in the *Coronado* case as to "general destruction" and held that the burning of cars engaged in interstate commerce did not necessarily show the "specific intent" required to establish the restraint of trade and commerce made the subject of the Anti-Trust Act.

The fact that interstate commerce was actually restrained to some degree as a result of industrial warfare, in the *Coronado* and other cases connected with it, even though the restraint was carried out by lawless means, was not sufficient to draw a local industrial conflict between labor and capital into the circle of jurisdiction of the national government. It may be conceded that such attempts and trespasses might be so numerous and so extensive as to warrant the interference of the national power, through its legislative, executive or judicial power, but national interests were scarcely involved in the incidental and slight interference with interstate commerce by the violent acts in connection with the coal strike in Western Arkansas. The case at bar is equally one involving local disputes and a local industrial conflict, but unlike the *Coronado* case it was carried on by peaceful and lawful means.

The *Coronado* case stands for the proposition that in a local strike, where the acts of the strikers prevent the mining of coal and its shipment in interstate com-

merce, and to that extent restrain interstate commerce, there is no violation of the Anti-Trust Act, if the acts are not committed with the intent and purpose of restraining interstate commerce, and if any such restraint of commerce is indirect and secondary. The case is the reverse of *Loewe v. Lawlor* and *Duplex Co. v. Deering*. In those cases the restraint of interstate commerce was the direct and primary object and interstate commerce was the subject of the agreement. In the *Coronado* case the defendants did not have in mind interstate commerce, they had in mind coal mining and wages. In the former cases the acts transcended state lines and interstate commerce was directly affected; their intent was transferred from local labor conditions to interstate commerce and a restraint of interstate commerce became their primary object. In the *Coronado* case the effect was purely local and interstate commerce was affected only incidently and remotely. In the *Coronado* case we have our attention called again, just as in the *Hopkins* and *Anderson* cases to the *local* character and effect of the acts complained of. We think this of much significance.

The most recent labor case is the *Herkert & Meisel* case (*United Leathers Workers v. Herkert & Meisel Trunk Company*, 265 U. S. 457 (decided June 9, 1924)). The plaintiffs in this case were trunk manufacturers in St. Louis. Almost the whole of the product of their factory was shipped in interstate commerce and they had contracts in hand for the sale to other states of more than a hundred thousand dollars of trunks. The defendants demanded that the factory be unionized and

conducted as a closed shop, and announced that if their demands were not acceded to they would ruin the interstate *business* of the plaintiffs. Thereupon a strike was declared, accompanied by assualts upon and intimidation of plaintiffs' employees, with the result that plaintiffs were compelled to cease to manufacture trunks, and their interstate business was interfered with and obstructed.

The court stated that the sole question was "whether a strike against manufacturers by their employees, intended by the strikers to prevent, through illegal picketing and intimidation, continued manufacture, and having such effect, was a conspiracy to restrain interstate commerce under the Anti-Trust Act because such products when made were to the knowledge of the strikers, to be shipped in interstate commerce, to fill orders given and accepted by would-be purchasers in other states, in the absence of evidence that the strikers interfered or attempted to interfere with the free transport and delivery of the products when manufactured from the factories to their destination in other states, or with their sale in other states".

The court decided the question in the negative and held that the acts of defendants complained of did not constitute a violation of the Anti-Trust Act. The court, following the reasoning in the *Coronado* case, held that manufacture was not commerce in and of itself; that the mere intentional cutting down of manufacture is not a direct restraint of commerce in the product intended to be shipped when ready; that the restraint to constitute a violation of the Act must be real and direct and not something incidental and remote.

After commenting upon the various leading cases, and pointing out that in the *Swift* case it was held that the acts constituted a restraint because of the intended obstruction of interstate commerce, the court said:

> "The case rested wholly on the probably effective intent of the conspirators directed against interstate commerce."

The court showed that in *Addyston Pipe Co. v. United States*, 175 U. S. 211, the defendants' "intent and ability to control prices and prevent the public from having the benefit of competition in interstate trade brought them within the Federal Anti-Trust Act". The *Hopkins*, the *Anderson* and the *Knight* cases are referred to and explained on the ground that the acts complained of were held not to be violations of the Anti-Trust Act because they did not reveal "the probably effective intent directly to compass the restraint on interstate commerce". *Loewe v. Lawlor* and *Duplex Co. v. Deering* were distinguished because of the defendants' "palpable intent to achieve their purpose by direct obstruction of that commerce".

The court concludes with the statement:

> "This review of the cases makes it clear that the mere diminution of interstate commerce by the illegal or tortious prevention of its manufacture, is an indirect or remote obstruction to that commerce. It is only when the intent or the necessary effect upon such commerce in the article is to enable those who intentionally diminish its product, to monopolize its supply or control its price or discriminate as between its would-be purchasers, that such unlawful diminution of its manufacture can be said directly to burden interstate commerce."

It is to be observed that in the *Herkert & Meisel* case the allegations of the bill, which are not stated to have been denied or disproved in this respect, averred that defendants threatened, before their strike began, that if their demands were refused they would ruin plaintiff's interstate commerce (265 U. S. 457, 462). The court, however, disregarded this allegation and treated the case on the broad ground that the end aimed at by the strikers was not the destruction of the interstate commerce, but the winning of their objects regarding unionization of plaintiff's shops. In other words, the court regarded the ultimate purpose, not the secondary purpose. Compare with this analysis, what was said in the *Coronado* case respecting the "local motive" (259 U. S. at pp. 411 and 412).

Another allegation of the bill in the *Herkert & Meisel* case was regarded as more important. It was stated that the defendants had instituted a boycott which they were prosecuting by illegal means. The court found, however, that " there was no evidence whatever that any attempt was made to boycott the sales of the complainants' property in other states or anywhere or to interfere with their shipments of goods ready to ship" (265 U. S. at p. 463). This differentiated the case from *Loewe v. Lawlor*.

The *Herkert & Meisel* case is the counterpart of the *Coronado* case, and like the last named case resembles the case at bar. Both were *local* in their situs and effect; in neither case did the agreement of the defendants have interstate commerce for its subject matter, or the restraint of interstate commerce as its object; in both cases the effect on such commerce was incidental

and remote. It is also worthy of note that in both cases the defendants had employed illegal means—in the one case to prevent the mining of coal and in the other case to prevent the manufacture of trunks.

The decisions in the *Coronado* and *Herkert & Meisel* cases would seem to be inevitable, if the federal courts are not to take over the decision of practically every labor controversy. If it were to be held that the diminution in interstate commerce resulting from a strike or lockout in a factory engaged in the manufacture of goods which are to be later the subject of interstate commerce constitutes an unlawful restraint of interstate commerce, practically all strikes or lockouts would be within the Anti-Trust Act and this court must become the arbiter of every labor dispute. The court in the *Herkert & Meisel* case recognizes this, and adopts with approval the language of the dissenting opinion in the Circuit Court of Appeals, as follows:

> "The natural, logical and inevitable result will be that every strike in any industry or even in a single factory will be within the Sherman Act and subject to Federal jurisdiction provided any appreciable amount of its product enters into interstate commerce." (284 Fed. 446, 464.)

From the decisions of this court, the following propositions are deducible:

1. That the restraints which are prohibited by the Act are those which are "direct", and not those which are "accidental, secondary and remote".
2. That in labor cases, if the subject matter of the combination is not interstate commerce, and if

the object is not the direct restraint of that commerce, but the accomplishment of non-commercial aims, there is no restraint of interstate commerce within the meaning of the Act, even though there be a diminution of interstate commerce.

3. That the situs, and extent of the restraint are important factors in determining whether the restraint is within the inhibition of the Act.

(c) In Order That a Restraint of Trade be Obnoxious to the Act, It must Constitute an "Undue" Restraint.

Not only must the restraint of interstate commerce be direct to come within the prohibition of the Anti-Trust Act, but it must also be "undue". "Undue" here means "unreasonable", and unreasonable in turn means "prejudicial to the public interest". So we may say that only such restraints as are prejudicial to the public interest are unlawful.

The so-called rule of reason was first announced in the *Standard Oil* case *(United States v. Standard Oil,* 221 U. S. 1), which held that the Anti-Trust Act does not prohibit acts which do not unduly restrain interstate commerce. In the *Standard Oil* case, Chief Justice White said:

> "That in view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation.

> The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference,—that is, an undue restraint."

The rule is well expressed in *Trenton Potteries Co. et al. v. United States,* 300 Fed. 550, at 553, where the court quotes from *Nash v. United States,* 229 U. S. 373, and says:

> "In the well-known cases relied on by defendants, the court was not defining a civil injury; it was defining the phrase 'in restraint of trade'. That is a very old phrase of the law; it became a term of art generations before the Sherman Act was enacted, and the cases cited are full authority for the proposition that, when that phrase was used by the Congress in this statute, it meant the same kind of restraint of trade that the law had known for generations, to wit, undue and unreasonable restraint; and when the highest court assigned this meaning to the phrase, that meaning applies, however and wherever the statute is invoked.
>
> The point is not without authority, if any were needed. In *Nash v. United States,* 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232, a demurrer was lodged to an indictment under the Sherman Law on the ground 'that the statute was so vague as to be inoperative on its criminal side' (page 376 (33 Sup. Ct. 781)), and this objection to the 'criminal operation of the statute' was thought to be warranted by the Standard Oil and Tobacco cases, supra. But Holmes J., for the court, speaking in a criminal case, declared that the cases last referred to '*may be taken to have established that only such contracts and combinations are within the act as by reason of intent or the inherent nature of the con-*

templated acts prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade'." (Italics are ours.)

The statement of the rule is much simpler than its correct application. When is a restraint undue or unreasonable? What restraints prejudice the public interest, and what do not? It would seem to be impossible to lay down any clearly defined rules for the determination of these questions. Certain things we do know constitute an "undue" restraint—such as monopoly, price fixing, and the elimination of competition. If there is a direct restraint with a purpose or effect to create a monopoly or to fix prices or to eliminate competition, the restraint is *ipso facto* unreasonable.

It is equally difficult to enumerate the cases where a direct restraint of interstate commerce is found to be reasonable and hence lawful.

The Chicago Board of Trade case would seem to be such a case *(Board of Trade v. United States,* 246 U. S. 231). In this case the defendants were charged with violating the Anti-Trust Act in this: They were members of the Chicago Board of Trade, and were prohibited by the rules from purchasing or offering to purchase, during the period from the close of the Board one day, until the opening on the next day, any grains "to arrive" at a price other than the closing bid at adjournment. The defendants attempted to introduce evidence showing that the purpose and effect of the

rule was not to prevent competition and that it resulted in hardship to no one. This evidence was refused.

In holding that the defendants had not violated the act, the court said (p. 238):

> "The case was rested on the bald proposition that a rule or agreement by which men occupying positions of strength in any branch of trade fixed prices at which they would buy or sell during an important part of the business day is an illegal restraint of trade under the Anti-Trust Law. But the legality of an agreement or regulation cannot be determined by so simple a test as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual and probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation, or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

The court then examined the evidence and concluded that "the evidence admitted makes it clear that the rule was a reasonable regulation of business, consistent with the provisions of the Anti-Trust Law". The evidence showed that it applied only to a small portion of

the grain shipped; that it had no appreciable effect on market prices and that it in fact facilitated trading.

The *Board of Trade* case stands for the proposition that even though the court finds a restraint of commerce, it will examine the facts of the business involved, its condition before and after the restraint was imposed, the nature of the restraint and its effect, and the intention of the parties, and from all these will determine whether the regulation is reasonable or unreasonable and hence, whether or not it violates the Anti-Trust Act.

To pursue at length the question as to what are "undue" restraints would be of no real value in the consideration of the case at bar, for the decisions already mentioned have marked out clearly that certain agreements are not unlawful. It is our contention that the evidence in the case at bar shows that the acts of these defendants fall clearly within the lines laid down in these cases as not being violations of the Act.

We will summarize the law:

In order to constitute a violation of the Anti-Trust Act there must be:

(1) A combination to restrain interstate commerce, and

(2) (a) A direct restraint (not "accidental, secondary and remote"), or

(b) A probably effective intent of restraining interstate commerce (a "dangerous probability" of so doing), and

(3) An unreasonable restraint, and in the determination of this question the court will consider:

(a) The intent.

(b) The scope of the restraint.

(c) The effect of the restraint.

(d) The territorial extent of the restraint.

(e) The lawfulness of the means employed.

(d) Application of Law to Facts in This Case.

Let us test this case by the law announced in the decisions of this court. It is claimed that in this case there was a conspiracy to restrain interstate commerce. What was the conspiracy and what was the restraint?

The Permit System was a system whereby San Francisco materialmen refused to sell in San Francisco building materials for use in San Francisco on non-American Plan jobs. A specially selected group of materials were chosen for its operation. The Permit System was not intended to apply to materials in other states or to goods in interstate commerce, nor did it apply to goods destined for use outside of San Francisco. The materials covered by the Permit System were: cement, lime, plaster, brick and clay products, and sand, rock, and gravel. All these materials, covered by the Permit System, were produced in the State of California. Some lime and some plaster, but inconsiderable in comparison with the entire supply used in San Francisco, were produced in nearby states by California corporations which brought them to their warehouses in San Francisco for sale. Such lime and plaster, produced outside of California,

and which were covered by the Permit System, were in all instances on hand in San Francisco in the warehouses of their producers when first made subject to the Permit System. Though, as heretofore indicated, the Industrial Relations Committee of the Builders Exchange suggested that certain other materials, some of them produced outside the State, be placed under the Permit System, this proposal was never ratified, never went into effect, and no permits were in fact ever required for these materials (pp. 445, 454, 457).

The question therefore narrows itself to this: Is a refusal to sell California produced materials in San Francisco for use in San Francisco on non-American Plan jobs, a violation of the Anti-Trust Act? Is the refusal to sell certain lime and plaster produced in other states which are at the time in warehouses in San Francisco, for use in San Francisco on non-American Plan jobs, a violation of the Anti-Trust Act?

The opinion of the learned Judge of the court below finds the facts substantially as stated by us (pp. 34-37). He points out briefly the controversy over the closed shop and the American Plan, and asserts his inability to deal with the merits or demerits of the plan because of its intrastate nature. He says he cannot deal with the "end" to be attained, and only with the "means" employed to attain that end, so far as those means are condemned by federal statutes. He outlines the Permit System and the limitation of that system to the purchase and sale of building materials of local origin. His finding that the Industrial Relations Committee of the Builders Exchange placed in their list certain other

materials that were not of local origin, is accompanied by a statement that permits were never required for the purchase of such materials. In addition, as pointed out above, this action taken more than ten months before the bill of complaint was filed, was never ratified and never became effective. The fact found by the court that the Industrial Relations Committee recommended that "if necessary" the Permit System would be extended "to all other materials used in the building trades", is immaterial. It was not so extended. This recommendation of the Committee at most was a threat, much less harmful than the boasts of the strikers in the *Herkert & Meisel* case that they would destroy the employers' interstate commerce. Mere intent without overt act or a reasonable probability of putting it into effect is outside the field of judicial interference.

The court's chief insistence is, however, not upon a proposed plan that never became effective. The learned Judge finds a fact which is not disputed, and upon which he chiefly bases his action in granting the decree. It is, in the words of the court, as follows:

> "A third outstanding fact is that plumbers' supplies which are manufactured for the most part without the State, while not directly under the Permit System were just as effectively dealt with by the simple process of refusing a permit to purchase the materials that were under the system, to anyone who employed a 'bad plumber', that is to say, one who was not operating under the American Plan."

The theory of the learned Judge is that because an owner of a building lot or his building contractor could not buy local products, such as sand, cement, brick, plas-

ter, gravel and the like, unless he employed non-union men as well as union men, on his building operations, there was a restraint upon building operations and therefore upon the sale and purchase of goods and supplies used in buildings and brought from other states. In fact after November, 1922, any person might purchase plumbing supplies freely and in any quantities desired. To be sure, he might be embarrassed in completing a structure with the products then purchased, because of the practical difficulty of buying other products of purely local origin required to constitute a complete house. But the fact that such a person might not be able to use goods formerly in interstate commerce after he had purchased them, unless he changed his industrial relations with regard to his neighbors in San Francisco, is not a restraint on commerce. If San Francisco were in the hands of a riotous mob, interstate commerce would be interrupted, because local business would be suspended. Yet from this alone, no one would contend that interstate commerce was restrained within the meaning of the Anti-Trust Act. If the carpenters strike in the same city, they tie up building. Are they amenable to the United States Anti-Trust Act because as a result of the tie-up owners and contractors stop buying tools and materials made in Pennsylvania and Connecticut? Any restraint resulting from such conduct as that of the rioters or the strikers in the cases mentioned, or the members of the Builders Exchange in the present case, is only remote and indirect and wholly incidental to a local conflict having no relation to commerce. Indeed there was in fact no restraint whatever if the situation is viewed as a totality and not

from the point of view of one who wanted to employ union labor and none other. Building went on, in fact, with renewed activity and the market for the products of goods produced at home and elsewhere was larger and more active than under the old closed shop conditions.

Reduced to its lowest terms, the court's decree based on this finding restrains defendants from refusing to sell their own products made in California to fellow Californians whom they regard as "bad", on the ground that if they continue the refusal they will affect the desire of the "bad" men to buy other wares made in Ohio or Illinois. We say their "desire" to buy for concededly they had the "power" to buy, if they wanted to do so.

It seems clear that the acts and agreements of the defendants as to state produced materials do not directly restrain interstate commerce inasmuch as they are confined to goods which have their origin and are destined for ultimate consumption in a single state. As a matter of fact, the refusal to sell state goods in San Francisco, for consumption in San Francisco, could have no other effect than to increase the consumption and use of interstate goods, and to that extent to stimulate interstate commerce rather than to restrain it. In any event, a consideration of the decisions reveals that any restraint, such as might result from such acts or agreements is not a restraint prohibited by the Act.

The decisions of this court have made it clear that agreements which result in the restraint of intrastate, as distinguished from interstate commerce are not within the Act, and that the court acquires no jurisdiction

over that part of a combination or agreement which relates to commerce wholly within a state, by reason of the fact that the combination also covers commerce which is interstate. In *Addyston Pipe & Steel Co. v. United States,* 175 U. S. 211, the court, in limiting the injunction to combinations which are interstate in character and to that extent modifying the decree of the lower court, said:

> "The views above expressed lead generally to an affirmance of the judgment of the court of appeals. In one aspect, however, that judgment is too broad in its terms—the injunction is too absolute in its directions—as it may be construed as applying equally to commerce wholly within a state as well as to that which is interstate or international only. This was probably an inadvertence merely. Although the jurisdiction of Congress over commerce among the states is full and complete, it is not questioned that it has none over that which is wholly within a state, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce. It does not acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a state, by reason of the fact that the combination also covers and regulates commerce which is interstate. The latter it can regulate, while the former is subject alone to the jurisdiction of the state. The combination herein described covers both commerce which is wholly within a state and also that which is interstate.
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> "In regard to such of these defendants as might reside and carry on business in the same state where the pipe provided for in any particular contract was to be delivered, the sale, transportation, and delivery of the pipe by them under that contract would be a transaction wholly within the state, and the statute would not be applicable to them

in that case. They might make any combination they chose with reference to the proposed contract, although it should happen that some non-resident of the state eventually obtained it."

As to the refusal to sell in San Francisco for use in San Francisco, small quantities of lime and plaster produced in other states, it is equally clear that such refusals did not constitute a violation of the Act. Such goods at the time of the refusals had ceased to be in interstate commerce. It is true that some of the lime and plaster had once been the subject of interstate transportation, but in every instance of a refusal to sell, the actual lime or plaster was in the warehouse of the dealer in San Francisco. As no refusals were made save as to materials to be *used in San Francisco*, it is apparent that the materials had in truth come to their final resting place and were no longer in interstate commerce.

"When freight actually starts in the course of transportation from one state to another it becomes a part of interstate commerce. The essential nature of the movement and not the form of the bill of lading, determines the character of the commerce involved. And generally when this interstate character has been acquired it continues, at least until the load reached the point where the parties originally intended that the movement should finally end."

Illinois Cent. Ry. v. De Fuentes, 236 U. S. 157, 163.

See also,

Public Utilities Comm. of Kansas v. Landon, 249 U. S. 236.

The materials here are not like the cattle in the *Swift* case or in *Stafford v. Wallace* (258 U. S. 495), where it was found that

> "the stockyards are not a place of rest, or destination * * *. They are but a throat through which the current flows and the only transactions which occur therein are only incident to the current from the West to the East and from one state to another."

The sales in the present case were not in the current of interstate commerce, the transit had stopped for all time. The materials were at their ultimate destination, never more to move out into interstate commerce.

In *Brown v. Huston*, 114 U. S. 622, the court upheld a tax imposed by Louisiana upon coal imported from another state for sale in Louisiana, basing its decision that the tax did not affect the free and unrestrained flow of interstate commerce upon the fact that the tax

> "was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year or two years or only for a day. It had become a part of the general mass of property in the state * * *."

In the case of the Permit System, the materials had either never been out of the state and never would be, they had never been and never would be in interstate commerce; or the materials had reached their final destination and resting place, had become part of the general property in the state and were destined never again to go into interstate commerce.

We are dealing therefore with materials which are not in *interstate commerce.* This fact is of great importance just as it was in the *Coronado* and *Herkert & Meisel* cases.

Under the decisions of this court the Permit System does not violate the Anti-Trust Act, for it does not directly restrain interstate commerce, nor is it shown to be unreasonable.

In the *Knight* case (*United States v. E. C. Knight Co.,* 156 U. S. 1), the court announced certain principles which have never since been questioned. They may be summarized as follows:

> Although acts or agreements may inevitably affect interstate commerce, this fact does not necessarily render them unlawful restraints of such commerce. If the effect of such acts or agreements upon interstate commerce is but secondary, indirect or remote, the acts or agreements are not within the prohibition of the Act.

It was held that manufacture was not commerce and that a restraint thereon was not, of itself, a restraint of interstate commerce.

In the *Coronado* case (*United Mine Workers v. Coronado Coal Co.,* 259 U. S. 344), it was held that obstruction of coal mining, though it inevitably prevented coal from going into interstate commerce, was not of itself an unlawful restraint of interstate commerce, because the effect upon interstate commerce was remote, secondary and incidental.

In the *Herkert & Meisel* case (*United Leather Workers v. Herkert & Meisel,* 265 U. S. 457), striking, picket-

ing and intimidations by strikers prevented the manufacture of leather goods and their shipment into interstate commerce. It was held that these acts did not constitute an unlawful restraint of interstate commerce. As in the *Knight* and *Coronado* cases, the effect upon interstate commerce was remote, secondary and incidental.

In each of these cases the effect upon interstate commerce was inevitable. In each there was an unbroken chain of cause and effect. Yet in every case the restraint was held not to be a restraint in violation of the Act for the reason that it was merely secondary, remote, indirect and incidental. In every case the intent of the parties was directed at manufacture or production—something other than commerce.

In the case at bar the defendants attempted to establish certain building conditions in San Francisco. If the *manufacture* and *production* of materials, even though they may ultimately go into interstate commerce, are not of themselves interstate commerce, and a restraint thereon is not of itself an unlawful restraint of interstate commerce, no more is the refusal to sell materials for the erection of buildings in San Francisco, even though it may affect the *consumption* of materials which have at one time been in interstate commerce, in and of itself, an illegal restraint of such commerce. Any effect upon interstate commerce that may result from restraints upon such building construction is, just as in the manufacturing and mining cases, merely secondary, remote, indirect and incidental.

In the *Knight,* the *Coronado,* and the *Herkert & Meisel* cases, the acts, in and of themselves, did not constitute direct restraints of interstate commerce; nor could they be tied to interstate commerce by the intent of the parties, for it was found that the intent of the parties there was directed at something other than commerce, namely, manufacture and mining. Here the acts in and of themselves do not constitute restraints of interstate commerce. A restraint upon building construction is not a restraint on interstate commerce. A restraint upon the sale in San Francisco of goods for ultimate consumption in San Francisco is not of itself a restraint on interstate commerce. Nor can these acts be tied to or connected with interstate commerce by the intent of the parties, for here the intent of the parties was directed at something *other* than interstate commerce, namely, the establishment of proper labor conditions in the building industry in the City of San Francisco. What the defendants had in mind was not trade or commerce, prices or profits. The defendants acted for the purpose of freeing the building industry in a single city from unreasonable and uneconomic building conditions. They had no intention to restrain interstate commerce or to affect it in any way. They did not fix prices and they did not limit competition.

In the cases referred to, as in the case at bar, the parties were engaged in activities beyond the limits of interstate commerce, which affected goods either before they entered upon interstate commerce or after they had ceased to be in interstate commerce. There was no intent

to affect or restrain interstate commerce, to fix prices or to restrict competition.

But the decisions of this court, involving restraints upon the activities of persons engaged in occupations directly touching upon interstate commerce, announce that even in such cases there may be no violation of the Act.

In the *Hopkins* case (*Hopkins v. United States,* 171 U. S. 578), an organization of commission men in the Kansas City live stock market adopted rules and regulations for the conduct of their business, one of which prohibited them from dealing with non-members. The court held that the services of the brokers were services collateral to interstate commerce and that therefore the agreement was not a violation of the Act, even though it dealt with property in the very course of interstate commerce.

In the *Anderson* case (*Anderson v. United States,* 171 U. S. 604), the members of the Livestock Exchange, who were themselves buyers and sellers of cattle, adopted a rule prohibiting members from dealing with non-members. It was held that this did not violate the Act, although the operation of the rule might affect interstate commerce, for there was no price fixing, no restriction of competition, and a refusal to deal with persons who would not subscribe to just rules did not have any direct or appreciable effect on interstate commerce.

In the *Chicago Board of Trade* case (*Chicago Board of Trade v. United States,* 246 U. S. 231), the members

of the Board of Trade were bound by the last bid at call as the price for grain "to arrive" until the opening of the next session the following morning. The lower court held that as this fixed prices during an important part of the day, it was an illegal restraint upon interstate commerce. But this court held that the rule was merely a reasonable regulation of the conduct of the business of the members of the Board. The arrangement was merely the fixing of just and fair rules and constituted a reasonable basis upon which the members engaged in a certain business might compete against one another in their trading. There was no combination, no monopolization, and no fixing of prices for private profit.

The similarity of the case at bar to the *Hopkins* and the *Anderson* cases is striking. In all three cases the agreements were local, they were limited to one locality in a single state. The subject matter of the agreements was not trade or commerce, but *the regulation of methods of doing business.* The intent of the parties was not to restrain interstate commerce. The agreements did not fix prices or limit competition. Membership in the Associations was open to all who would abide by the rules. The effect upon interstate commerce in all three cases was incidental, secondary and remote. As a matter of fact any possible restraint in the *Hopkins* and *Anderson* cases would have been much more direct than it possibly could have been in this case, for in those cases the goods with which the defendants were dealing were cattle in the very midst of interstate transportation, while in the case at bar

most of the goods had never been, and would never go beyond the borders of the state, and the remainder were goods which had come to rest for all time in the City of San Francisco.

The similarity between this case and the *Coronado* and *Herkert & Meisel* cases is also striking. All are labor cases, and arose out of industrial controversies. The parties did not have interstate commerce in view, they thought only of conditions of labor. There was no intent to restrain commerce. The acts were local, being in each case confined to a single portion of a single state. In the *Coronado* case coal mining was affected, in the *Herkert & Meisel* case it was the manufacture of trunks, neither of which, under the authority of the *Knight* case, is interstate commerce in and of itself. And in the case at bar building and building conditions are not interstate commerce. The effect on interstate commerce in those cases as in this is secondary, remote and incidental. Indeed the restraint in the two named cases was much more direct than it could possibly be in the present one. Diminution in interstate commerce was almost sure to follow the cessation of coal mining and manufacturing. In this case there has been no diminution or restraint of interstate commerce, and there is no evidence that anyone engaged in interstate commerce suffered any abatement of his business, or that prices or competition were in anywise affected.

The effect of the defendants' activities has been to put the American Plan in effect in San Francisco. It is no longer a closed shop city. No qualified worker

is discriminated against on account of membership or lack of membership in a labor union. Building has increased, bank deposits have grown, shipping has almost doubled since the American Plan has become the rule governing the building trades.

The case presented in the record is that of a local industrial conflict. The defendants are direct participants. They contend for the establishment of the "American Plan" in the building industry, the right of every competent worker to employment irrespective of whether he belonged to a union or not. They make no discrimination against union men, their only quarrel is against the closed union shop. In the course of battle, when met by strikes by the union men for the closed shop, these defendants refuse to sell specified building materials in San Francisco to their enemies for use on any closed shop jobs in San Francisco and vicinity. Such materials with the exception of certain lime and plaster are all produced within the state. The lime and plaster at the time of the refusal to sell are in the warehouses in San Francisco. Trade and commerce and building do not stop. Building increases and commerce thrives. The defendants commit no unlawful acts in the conduct of their battle.

Can it be maintained that the acts of the defendants constitute an undue restraint on interstate commerce, in a case where interstate commerce is neither the subject nor the object of the agreement, where any effect on interstate commerce is incidental, secondary and remote, where the situs and effect of the acts are

local and where the result and effect are not detrimental to the public interest?

If these facts justify the application of the Anti-Trust Act, it can fairly be said that every participant in a local labor dispute who seeks to protect himself by refusing to sell goods to or to buy goods from his enemy has violated the Anti-Trust Act, and is subject to the jurisdiction of the United States Courts.

If such a rule be applied, it should be applied to the striker as well as to the employer. The act of the employee in striking and thus preventing the use and consumption of goods which have once been the subject of interstate transportation, or the manufacture of goods which would in the normal course of events go out into interstate commerce, must be equally unlawful. But the decisions of this court rightly say that such acts are not unlawful and we submit that these decisions as well as the other decisions cited, clearly show that the acts of the defendants do not constitute a violation of the Anti-Trust Act.

II.

THE DECREE IS VAGUE, INDEFINITE AND UNCERTAIN AND DOES NOT SET FORTH THE ACTS OR TRANSACTIONS WHICH ARE FORBIDDEN. IT IS A SWEEPING INJUNCTION TO OBEY THE LAW AND PUTS THE WHOLE CONDUCT OF THE DEFENDANTS AT THE PERIL OF A SUMMONS FOR CONTEMPT.

Not only is the decree not justified by the evidence, but its provisions are so broad and indefinite as to constitute error.

The decree is couched in such terms that it is impossible to determine what the defendants may do and what they may not do; what is lawful and what is unlawful. In effect "it is an injunction to obey the law." The defendants are left wholly in the dark as to the specific acts enjoined, and as to the limits of the operation of the injunction. They are therefore unable to conduct themselves so as to protect themselves against summons for contempt.

The bill in this case charged that the defendants violated the Anti-Trust Act in that they combined to restrain interstate commerce. The bill alleged that divers means and methods were used by the defendants in the furtherance of their conspiracy, such means and methods being specified in thirteen separate items (pp. 3 and 4). The evidence fails to show that the defendants employed any of the specified means and methods, with the exception of attempting to render effective the American Plan, and of employing the Permit System. The bill therefore is of no value or assistance in interpreting the decree of the court so as to render it more certain.

The court in its opinion and order expressed itself as follows (p. 34):

> "The defendants will not be dissolved nor their general activities interfered with, but a decree will be entered enjoining them from requiring any permit for the purchase of materials or supplies produced without the state and coming here in interstate commerce, or for making as a condition for the issuance of a permit any regulation that will interfere with the free movement of plumbers' or

other supplies produced without the state. They will also be enjoined from attempting to prevent or discourage any person without the state from shipping goods to any person whatever within the state."

The decree follows exactly the language of the opinion. It provides (p. 38):

"That the said defendants and each of them, and their members, officers, agents, servants and employees, and all persons acting under, through, by or in behalf of them, or any of them, or claiming so to act, be and hereby are perpetually enjoined, restrained and prohibited, directly and indirectly, individually and collectively, from

"(a) Requiring any permit for the purchase, sale or use of building materials or supplies produced without the State of California and coming into said State of California in interstate or foreign commerce.

"(b) Making as a condition for the issuance of any permit for the purchase, sale or use of building materials or supplies any regulations that will interfere with the free movement of building materials, plumbers' or other supplies produced without said State of California.

"(c) Attempting to prevent or discourage any person without said State of California from shipping building materials or other supplies to any person whatsoever within said State of California.

"(d) Aiding, abetting, or assisting, directly or indirectly, individually or collectively, others to do any or all of the matters or things herein set forth."

The perplexity in which the defendants find themselves is that they do not know and cannot ascertain from an examination of the decree what they must do to obey it, nor what they are permitted to do under

its terms. The limits of the operation of the decree are not clearly defined, and the defendants are at a loss to know whether or not a particular act or acts will place them in peril of proceedings for contempt.

The court has spoken upon the subject in the case of *Swift & Co. v. United States,* 196 U. S. 375. There it was said:

> "The general objection is urged that the bill does not set forth sufficient definite or specific facts. This objection is serious, but it seems to us inherent in the nature of the case. The scheme alleged is so vast that it presents a new problem in pleading. If, as we must assume, the scheme is entertained, it is, of course, contrary to the very words of the statute. Its size makes the violation of the law more conspicuous, and yet the same thing makes it impossible to fasten the principal fact to a certain time and place. The elements, too, are so numerous and shifting, even the constituent parts alleged are, and from their nature must be, so extensive in time and space, that something of the same impossibility applies to them. The law has been upheld, and therefore we are bound to enforce it notwithstanding these difficulties. *On the other hand, we equally are bound, by the first principles of justice, not to sanction a decree so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt. We cannot issue a general injunction against all possible breaches of the law. We must steer between these opposite difficulties as best we can.*" (Italics ours.)

There the decree was that the defendants be enjoined from entering into or performing any contract, combination or conspiracy the purpose or effect of which was to restrain trade and commerce in fresh meats among the

several states in violation of the Act either by directing or requiring their respective agents to refrain from bidding against each other in the purchase of livestock; or collusively, and by agreement, to refrain from bidding against each other at the sales of livestock; or by combination, conspiracy or contract raising or lowering prices or fixing uniform prices at which said meats would be sold either directly or through their respective agents; or by curtailing the quantity of such meats shipped to such markets and agents; or by establishing and maintaining rules for the giving of credit to dealers in such meats the effect of which rules was to restrain competition; or by imposing uniform charges for carriage and delivery of such meats to dealers and consumers the effect of which was to restrict competition, or by any other method or device the purpose and effect of which was to restrain commerce as aforesaid. In respect to the decree the court said:

> "The general words of the injunction 'Or by any other method or device the purpose or effect of which is to restrain commerce as aforesaid' should be stricken out. *The defendants ought to be informed as accurately as the case permits what they are forbidden to do.* Specific devices are mentioned in the bill and they stand prohibited. The words quoted are a sweeping injunction to obey the law and are open to the objection which we stated at the beginning that it was our duty to avoid. To the same end of definiteness so far as attainable the words 'as charged in the bill' should be inserted between 'dealers in such meats' and 'the effect of which rules'; and two lines lower, as to charges for cartage, the same words should be inserted 'dealers and consumers', and 'the effect of which'."

And later the court adds:

> "It only remains to add that the foregoing question does not apply to the earlier sections which charge direct restraints of trade within the decisions of the court, and that the criticism of the decree, as if it ran generally against combinations and restraint of trade or to monopolize trade ceases to have any force when the clause against 'any other method or device' is stricken out, so modified it restrains such combinations only to the extent of *certain specified devices* which the defendants are alleged to have used and intend to continue to use." (Italics are ours.)

The position of the defendants in the present case may be expressed in the language of the opinion in the *Swift* case, "the defendants ought to be informed as accurately as the case permits what they are forbidden to do". While difficulties are presented in framing the decree in this case, they do not approach those involved in the *Swift* case. First, the matters here involved are not nearly so vast in extent, being confined to a single city. Second, the facts for the most part are not in doubt. The American Plan and the Permit System are not disclaimed by the defendants but are contended by them to be entirely lawful and permissible. The remainder of the case is composed of a few trivial instances of alleged refusals to sell.

(a) The Decree is Too Broad in Its Application to Materials Coming From Without the State.

In paragraph (a) of the decree the defendants are enjoined from "*Requiring any permit for the purchase, sale or use of building materials* * * * *produced without the State of California and coming*

in to said state in interstate or foreign commerce". A literal application of this language would mean that goods produced without the state and coming into it in interstate commerce would forever continue to be subject to the injunction, no matter how many times they had been sold, and no matter how far they might be removed from the stream of interstate commerce. Interstate goods, under the language of the decree would never cease to be interstate goods; they would never become part of the general goods of the state so as to be the subject of state commerce or state regulation.

It is clear that interstate goods at some point do become part of the general goods in a state, and do cease to be the subject of federal jurisdiction. But the decree takes no account of this fact. There is a point beyond which the requirement of permits would not be an unlawful interference with interstate commerce. That point must be when the goods themselves cease to be "in interstate commerce". The decree should mark this point. In *Duplex Co. v. Deering,* 254 U. S. 443, the court was careful to confine the application of its decree to goods in interstate commerce when it restrained the defendants "from interfering or attempting to interfere with the sale, transportation, or delivery *in interstate commerce* of any printing press or presses * * *" by certain specific acts. The decree not only was limited to goods "in interstate commerce" but was limited to such interferences by certain specified acts.

(b) The Decree is Erroneous in Restraining the Permit System so Far as It Affects State Materials.

In paragraph (b) of the decree the defendants are enjoined from making as a condition for the issuance of any permit for the purchase, sale or use of building materials, any regulation that "*will interfere with the free movement of building materials, plumbers' or other supplies produced without the State of California*".

The decree must be read with the opinion of the court. So read, it is clear that the learned Judge of the court below had in mind in this portion of the injunctive relief granted by him, the purpose and intent to enjoin these defendants, engaged in selling products which were wholly of local origin and destination, from refusing to sell their products to persons in San Francisco to whom they did not wish to sell them. The judge's opinion clearly shows that this is the purpose of this part of the decree. The decree is merely putting into judgment his view that to refuse to sell sand to a contractor who employs "bad plumbers" is to lessen the probability that the contractor will want to buy Standard bath-tubs or Pittsburgh heaters or American radiators, or any other non-domestic products, because without sand, mortar and the like materials he can't build the house in which they would be installed.

Even without reference to the judge's opinion, it is obvious, however, that the purpose must be to enjoin the sale of local products to local customers in San Francisco under the Permit System. For not only is that system referred to—a system which the judge found to

be a local one—but the language of this part of the decree must be contrasted with Paragraph a (p. 38), which enjoins the requirement of a permit for the purchase, sale or use of building materials brought into California from other states. The present paragraph enjoins making as a condition for the issuance of any permit for the purchase, sale or use of building materials or supplies ("local" as contrasted with "interstate") any regulation that will interfere with the free movement of building materials, plumbing or other supplies (for which no permit was required or employed) produced without the state.

As has been pointed out, the decree in this respect goes beyond any permissible interference with the local and internal concerns of the community under the guise of the commerce clause. The decree in this respect is wholly void, because beyond the power of the court under the Anti-Trust Act.

In *Addystone Pipe & Steel Co. v. United States,* 175 U. S. 211, the court modified the injunction granted by the lower court so as to limit it to that portion of the combination or agreement which was interstate in its character, saying:

> "In one aspect, however, that judgment is too broad in its terms—the injunction is too absolute in its directions—as it may be construed as applying equally to commerce wholly within a state as well as to that which is interstate or international in character. This was probably an inadvertence merely. Although the jurisdiction of Congress over commerce among the states is full and complete, it is not questioned that it has none over that

> which is wholly within a state, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce. It does not acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a state, by reason of the fact that the combination also covers and regulates commerce which is interstate. The latter it can regulate, while the former is subject alone to the jurisdiction of the state."

If, however, it be urged that something less extensive is involved than the court's theory about the interconnection between the restraint of building operations as against certain persons and the movement of interstate commerce, the defendants are entitled to know to what conditions they may and what they may not exact for the issuance of permits for the sale of building materials. Inasmuch as they did not demand any conditions affecting the free movement of interstate goods, they are left wholly uninformed as to the extent of allowable conduct with reference to the Permit System.

(c) The Decree is Too Vague in Its Prohibition of "Attempts to Prevent, or Discourage Interstate Shipments".

In paragraph (c) of the decree the defendants are enjoined from "*attempting to prevent or discourage any person without said State of California from shipping building materials or other supplies to any person whatsoever within the State of California*". Literally interpreted this would prevent one of the defendants from writing to a friend in another state to tell him not to ship goods to California because business or industrial conditions were poor.

It would prevent one of the defendants from telling a friend in another state of the industrial controversy in San Francisco, as a result of which the friend might decide not to ship goods to California. It comes perilously near to being a restriction upon the freedom of speech.

In *New Haven R. R. v. Interstate Commerce Commission,* (1906) 200 U. S. 361, 404, counsel for the Commission objected to the injunction granted because it merely restrained the defendants from carrying out specific contracts regarding rates, whereas, it was claimed, it should have enjoined them from giving the railroad company or other persons, any undue or unreasonable advantage. Mr. Justice White said:

> "The proposition is that by the effect of a judgment against a carrier concerning a specific violation of the act, the carrier ceases to be under the protection of the law of the land, and must thereafter conduct all its business under the jeopardy of punishment for contempt for violating a general injunction. To state the proposition is we think to answer it. * * * The injunction which was granted in the case of *Re Debs,* 158 U. S. 564, was not open to such an objection, as its terms were no broader than the conspiracy which it was the purpose of the proceeding to restrain. To accede to the doctrine relied upon would compel us, under the guise of protecting freedom of commerce, to announce a rule which would be destructive of the fundamental liberties of the citizen."

Defendants submit therefore that entirely aside from the question as to whether or not the decree of the lower court should be reversed upon the evidence, the

decree is in such form as not to advise the defendants as specifically as the case permits as to the acts which are forbidden, and for that reason error was committed.

In fact, the vice in the decree is inherent in the very nature of complainants' case. The lower court erred not so much in the framing of the decree as in entering any decree at all against the defendants.

III.

AS TO CERTAIN OF THE DEFENDANTS, THE EVIDENCE WHOLLY FAILS TO SHOW ANY PARTICIPATION IN ANY OF THE ACTS OR THINGS COMPLAINED OF OR ANY CONNECTION THEREWITH. THE COURT THEREFORE COMMITTED ERROR IN ENTERING ITS DECREE AGAINST SUCH DEFENDANTS.

Of the forty-nine defendants in this suit, there are ten who did not participate in any way in any of the acts or transactions which are the basis of the suit, and who are not connected therewith in such a way as to justify any decree against them.

a. As to two of these defendants, namely, Builders Exchange of San Jose, and Bethlehem Shipbuilding Corporation, the record contains absolutely no evidence of any kind. They are not even shown to be members of one or the other of the principal defendants, the Builders Exchange or the Industrial Association of San Francisco. By reason of the total lack of any evidence against them, the decree should be reversed as to them.

b. As to one other defendant, Grinnell Company, Inc., the evidence shows that it was in no wise con-

nected with any of the acts or transactions which formed the basis of the suit. It is not a member of the defendant associations. The Grinnell Company Inc., is a Rhode Island corporation, and according to the evidence has no connection whatever with the Grinnell Company of the Pacific which is also named as a defendant. Evidently the theory of the complainant was that the Grinnell Company of the Pacific, a San Francisco plumbing supply house, was the local agent of and was owned by the Grinnell Company, Inc., and for that reason the Grinnell Company, Inc., was responsible for and bound by the acts of the Grinnell Company of the Pacific. In an attempt to establish a connection between the two companies the affidavit of Coefield (p. 57) president of the Plumbers' Union was introduced. This alleged that the Grinnell Company, Inc., owned the stock of the Grinnell Company of the Pacific. This alleged fact is denied by Reddy, secretary of the Grinnell Company of the Pacific (p. 413), who states that the Grinnell Company, Inc., does not own any stock in the Grinnell Company of the Pacific, and has no connection therewith; that the Grinnell Company of the Pacific is not the agent of the Rhode Island corporation and does not deal in its goods. As the government had access to the books, files and records of both corporations with the opportunity easily to disprove these statements if incorrect, but did not do so, it must be that the assertions of Coefield, president of the Plumbers' Union, a stranger to both corporations, were incorrect. The most that can be said is that the Government made a mistake in

identity. There can be no question but that on the record the decree must be reversed as to Grinnell Company, Inc.

c. As to seven other defendants, there is no evidence whatever, except the mere showing that they held memberships in the Industrial Association of San Francisco or the Builders Exchange, or both. The evidence in this respect is as follows:

Santa Cruz Portland Cement Company was shown to be a member of the Builders Exchange (p. 210) and a member of the Industrial Association (p. 275).

J. S. Guerin & Company was shown to be a member of the Builders Exchange (p. 210).

Nephi Plaster & Manufacturing Company was shown to be a member of the Builders Exchange (p. 276).

McNear Brick Company was shown to be a member of the Builders Exchange (p. 210), and a member of the Industrial Association (p. 275).

The Otis Elevator Company was shown to be a member of the Industrial Association (p. 275).

W. P. Fuller & Co. was shown to be a member of the Industrial Association (p. 275) and a member of the Builders Exchange (p. 276).

Bass-Hueter Company was shown to be a member of the Builders Exchange (p. 276).

It is difficult to understand the basis upon which the complainant justifies its demand for a decree as against these defendants. The only conceivable argument would be that membership in either one or both of the

principal defendants *ipso facto* and in and of itself without more, made each and every one of the defendants guilty of the alleged conspiracy participated in by the associations of which they were respectively members.

There is no legal justification for any such proposition, and the attitude of complainant is particularly significant when it is realized that there are several thousand members of the Industrial Association and several hundred members of the Builders Exchange, all of whom, upon complainant's theory would be equally guilty in their individual capacities of participating in the alleged conspiracy.

An association is a creature of contract. The powers of an association, the functions of its officers, and the liabilities of its members are all determined by the law of contract. When a person becomes a member of an association he contracts as to what the association and its officers may do in the way of binding him by their actions. It is said that in associations formed for profit, the relation between the members is in the nature of a partnership *(Love v. Blair,* 72 Ind. 281, 5 *Corpus Juris,* 1334), and that in the case of an association formed for non-business purposes the relation between the association and its members is that of agent and principal, the association and its officers occupying the position of agent and the members that of principal. *(Ostrom v. Greene,* 161 N. Y. 353, 55 N. E. 919, 5 *Corpus Juris,* 1363).

In the case at bar the principal defendants, of which these particular defendants were members, were asso-

ciations formed for non-profit purposes, and were not engaged in business activities (pp. 222, 238). The relationship therefore between such associations and their officers and that of the members was that of agent and principal. The authority of the agent was set forth in the constitution and by-laws of the associations. This is the limit of the authority given by the members, and it is only under the exercise of that authority that they can be held responsible. The constitutions and by-laws of the associations reveal that they were formed for lawful purposes, and no authority whatever was delegated by the members to the associations or their officers to commit torts, much less crimes (pp. 222, 238).

In *Boutwell v. Marr*, 71 Vt. 1, 43 L. R. A. 803, the court said in disposing of a contention that membership in an association made the members responsible for the acts of the association and its officers:

> "The fact that the members of the association voluntarily assumed its obligation in the first instance, so far as it is a fact, is not controlling. The law cannot be compelled by any initial agreement of an associate member to treat him as having no choice but that of the majority nor as a willing participant in whatever action may be taken."

On what conceivable basis, therefore, can these particular defendants be held to have participated in the alleged conspiracy? The association itself may, it is conceded, be held responsible for the acts of its officers, even though such acts are beyond the scope of their authority. But membership in such association does not *ipso facto* make the members participants in the

alleged conspiracy. If evidence had been introduced to show that these particular defendants had knowledge of the acts of the associations and their officers, and stood by without making a protest, or had acquiesced in the acts, or received the benefits thereof, the court might have had some basis for holding these defendants responsible for the acts of the associations and their officers. But there is no such evidence. No attempt was made to connect these defendants with any of the so-called acts or devices alleged to have been employed by the principal defendants, or to show that they had knowledge thereof or acquiesced therein. The case against them rests solely upon the fact that they are members of the defendant associations. Under such a state of facts the decree against these defendants should be reversed.

What has been said with respect to the responsibility of members of an association for the acts of the association and its officers for torts applies *a fortiori* to liability for acts which constitute crimes.

A violation of Section 1 of the Anti-Trust Act, under which this suit is brought, is a penal offense. In *Atlanta v. Chattanooga Foundry & Pipe Works*, 127 Fed. 23 (C. C. A.) the court said:

> "We find ourselves in agreement with the court below in holding that an action under the seventh section of the Act of July 2, 1890, Chap. 647 (26 Stat. at L. 210), is not a penal action. The first three sections of the Act are undoubtedly penal. They forbid certain contracts and combinations, and provide that persons doing any of the forbidden things shall be guilty of a misdemeanor,

and subject to punishment by both fine and imprisonment."

The decree in the present case makes liable members of an association under a penal statute, for the act of that association, merely because they are members of the association, and this in spite of the fact that it is shown that the association was formed for lawful purposes and that the association and its officers were not authorized to do unlawful acts. Reduced to its simplest terms it is an attempt to hold a principal for the crime of his agent, performed without the scope of his authority. The mere statement of the proposition is sufficient to condemn it.

In *Lawlor v. Loewe,* 235 U. S. 522, where it was sought to hold certain individuals as members of the hatters union for damages under Section 7 (a non-penal section), evidence was introduced to show that such defendants were not only members of the union, but that they had received full and complete notice of its activities and had acquiesced in the various acts of its officers in furthering the object of the striking union. The lower court had directed the jury that if the members in question paid their dues *and continued to delegate authority to their officers unlawfully to interfere with the plaintiffs' interstate commerce* in such circumstances that they knew or ought to have known, and such officers were warranted in the belief that they were acting in the matters within their delegated authority, such members and no others were jointly liable. In passing on the question this court said:

"It seems to us that this instruction sufficiently guarded the defendants' rights and that *the defendants got all they were entitled to ask for in not being held chargeable with knowledge as matter of law.* It taxes credulity to ask anyone to believe that members of labor unions at that time did not know that the primary and secondary boycott and the use of the 'We don't patronize' and 'Unfair' lists were means expected to be employed in the effort to unionize shops * * *". (Italics ours.)

And referring to the acts of the union officials the court continued:

"Their conduct in this and former cases was made public especially among the members, in every possible way. If the words of the documents on their face and without explanation do not authorize what was done, the evidence of what was done publicly and habitually, showed their meaning and made for future interpretation, the jury cannot but find that by the usage of the unions the acts complained of were authorized, and authorized with regard to their interference with commerce among the states.

"We think it unnecessary to repeat the evidence of the publicity of this particular struggle in the common newspapers and union prints, evidence that made it almost inconceivable that the defendants, all living in the neighborhood of the plaintiff, did not know what was done in the specific case. If they did not know that they were bound to know the constitution of their societies and at least well might be found to have known how the words of those constitutions had been construed in act."

The liability of a large association formed for the purpose of attaining economic ends for the acts of constituent members bears a close relation to the question as to the liability of defendants whose active participa-

tion in the acts complained of was not shown. The question received much attention in the *Coronado* case (*United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344) where this court held that the International Union and the United Mine Workers of America were not responsible for lawless acts of a district union. Though the very purpose of the larger organization was in part to take over local strikes and to pay their cost if deemed wise, and though the evidence showed that the national president had complete knowledge of, expressed sympathy for, and to some extent approved of the lawless acts of members of the local union, the question of liability of the national organizations depended upon principles of actual agency, and was settled conclusively by the constitution of the Associations concerned.

After referring to the action of White, the national president, in thanking Stewart, the president of the local union, who was then in the penitentiary for his criminal act of conspiracy to defeat an injunction, and in subsequently appointing him to a position on a District Committee, the court said:

> "It would be going very far to consider such acts of the president alone a ratification by the International Board, creating liability for a past tort. The president had not authority to order or ratify a local strike. Only the Board could do this. White's report in an executive meeting of the Board of the riot of April 6 shows sympathy with its purpose and a lack of respect for law, but does not imply or prove on his part any prior initiation, or indicate a desire to ratify the transaction as his work. The Board took no action on his report."

Again, it said:

> "The argument of counsel for the plaintiffs is that, because the national body had authority to discipline district organizations, to make local strikes its own, and to pay their cost, if it deemed it wise, the duty was thrust on it, when it knew a local strike was on, to superintend it and prevent its being lawless at its peril. We do not conceive that such responsibility is imposed on the national body * * *. Here it is not a question of contract or of holding out an appearance of authority on which some third person acts. It is a mere question of actual agency, which the constitutions of the two bodies settle conclusively."

See also, as to the necessity of direct proof to connect defendants with a combination or conspiracy under the Anti-Trust Act, *United Mine Workers v. Pennsylvania Mining Co.*, 300 Fed. 965, 968-969; *Finley v. United Mine Workers of America*, 300 Fed. 972, 974-977.

The *Coronado* case and *Lawlor v. Loewe* were brought under section 7 of the act, a provision admittedly not penal in its nature. The court held in these cases that mere membership in an Association which violates the act does not charge the members with knowledge thereof as a matter of law, but that evidence of agency, or authority or participation is required before the defendants can be held. In the case at bar the sole evidence is that these defendants among many others, were members of the principal defendants. There is no evidence tending to show that they had knowledge of the acts which are alleged to constitute the conspiracy, or that they participated therein.

We submit that the decree should be reversed as to these defendants.

IV.

THE EVIDENCE.

The evidence in this case was introduced under stipulation in the form principally of voluminous affidavits. This practice resulted in the introduction of much irrelevant and incompetent matter, but has the merit that it places this court in as favorable position to judge of the credibility of the witnesses as was the trial court. The contents of the affidavits could only be contradicted by counter-affidavits, most of which are widely separated in the transcript from the affidavits which they controvert, a situation which requires that the various parts of the transcript be collated for the purpose of understanding the facts.

Considerable space is also taken up by evidence of the alleged refusal of certain plumbing supply houses to sell plumbing materials. As already pointed out these refusals ceased more than six months before the bill in this suit was filed. The evidence respecting them may therefore be disregarded. The explanation of the introduction of this particular evidence, is that it was part of the evidence in the action commenced in the state court under the state Anti-Trust Act, in which these defendants were acquitted, which action was commenced five months prior to the filing of the bill in this suit. When the transcript of the evidence in the state

court action was introduced in this suit, this evidence was included. It should however be disregarded.

The salient facts in this case are not contradicted. Those having to do with labor and industrial conditions in San Francisco before, during and after the industrial controversy, and the existence and operation of the so-called Permit System, are not the subject of serious dispute.

A contention is made by the Government, however, that there were certain direct interferences with interstate commerce. While the evidence concerning these alleged interferences occupies a very substantial portion of the transcript, as is shown by the opinion in the court below, the alleged acts are of comparative unimportance. As a matter of fact such alleged interferences were no part of and had nothing to do with the Permit System of the defendants or with the industrial controversy, but the alleged refusals to sell in each instance were predicated upon other reasons of a trade nature.

Alleged Direct Interferences with Interstate Commerce.

The defendants deny that they are parties to any direct interference with interstate commerce. The evidence shows that they were most careful at all times to avoid anything which might furnish any basis for such interferences. They cannot without proof of authority be charged with responsibility for the isolated and sporadic acts of individuals, who in an excess of zeal, or for personal or trade reasons, may have done things which were entirely beyond the plan and agree-

ment of the defendants. We will, however, devote ourselves briefly to a discussion of the evidence with respect to the so-called interferences. The evidence shows,

1. That the alleged refusals in each instance were not the result of agreement or combination on the part of the defendants, had nothing whatever to do with the industrial controversy, and were wholly individual acts of certain of the defendants, based on trade considerations personal to them.

2. That they are but ten in number and are spread over more than one year in space of time.

3. That the materials involved were of little value.

4. That certain of the alleged interferences are shown by the evidence, never to have taken place.

The specific alleged interferences are as follows:

1. Jumbo Plaster Co. (Gray, San Francisco) July 1, 1922.

   Jumbo Plaster Co. (Gray-Thorning) July, 1922.

2. Sandusky Cement (Gray-Thorning) October and November, 1922.

3. Keene Cement (Best Bros.) April, 1923.

4. Standard Gypsum Company (Golden Gate Building Materials Co.) February, 1923.

5. Pacific Portland Cement Company (Golden Gate Building Materials Company) January, 1922-August, 1923.

6. Three Forks-McCormick S. S. Co. (Golden Gate Building Materials Company) April, 1922.

7. Pirie Lime Company (Golden Gate Building Materials Company) October, 1922.
8. Sandusky Cement Company (Civic Center Supply Company) September, 1922.
9. Tacoma and Roche Harbor Lime & Cement Co. (Civic Center Supply Company) February, 1923.
10. Simmons Incident, May, 1922.

1. Jumbo Plaster Company.

The claim is made that the Jumbo Plaster Company, with a plant in Utah, refused to sell plaster to one Alexander Gray, a union official in San Francisco, said materials to be used by the Building Trades Council of San Jose, California (p. 298). The evidence shows that the shipments were delayed by reason of floods and damage to the plant in Utah; that when these conditions were alleviated, Mr. Payne of the Jumbo Company, visited San Francisco for the purpose of establishing a local agency. Upon ascertaining that Gray was not a recognized dealer, had falsely stated that he was purchasing plaster for export, had given a false name, and had no established facilities for handling his product, Payne reestablished the Cowell Company as the exclusive agent for Jumbo plaster. As a result the Jumbo Company refused to accept further orders from other persons, including Alexander Gray (pp. 269-272).

Correspondence between the Jumbo Company and Gray-Thorning was introduced to rebut the statement of the President of the Jumbo Company that all subsequent orders were referred to the Cowell Company

(p. 272). The correspondence itself, however, reveals that the Jumbo Company accepted an order from the Gray-Thorning Company of Redwood City, California, at which place its local agent, the Cowell Company, had no facilities or sales rooms.

2. Sandusky Cement Company.

This consists of two separate incidents. The first in order of time occurred in October and November, 1922, and consists of inquiries concerning a car of Medusa Cement shipped by the Sandusky Company from Ohio to strikers in San Jose, California (pp. 293, 4, 5).

The inquiry was made by Mr. George, Manager of the Henry Cowell Lime & Cement Company which at the time and for a long time previously had been engaged in litigation with the labor unions in San Jose and the San Jose Building Trades Council. The Cowell Company had the exclusive San Jose agency for Medusa Cement manufactured by the Sandusky Company, and made the inquiry for the purpose of determining whether others were buying Medusa cement for the San Jose territory. The result of the inquiry showed that this particular car was ordered by Gray-Thorning of Redwood City, California, ostensibly for use in the Redwood City District, but that it had been diverted by said company for use by the San Jose Building Trades Council in the City of San Jose, which was Cowell Company territory. The car was delivered, but thereafter the Cowell Company was active in attempting to prevent further shipments into its exclusive territory by companies having agencies for other territories (p. 448-52).

The Sandusky Company later refused to sell a small quantity of cement to Gray-Thorning. The evidence regarding this is quite voluminous, although the subject matter was a small quantity of material and of relatively small value (pp. 366, 372, 349, 355, 371, 365, 350, 370, 367). The evidence on this incident will reveal that the refusal of the Sandusky Company to sell was based on two considerations—first, the objection of the Cowell Company, its principal agent in California, that Gray-Thorning was purchasing cement and diverting it to territory in which the Cowell Company had an exclusive agency (pp. 448-52), and, secondly, the desire of the Sandusky Company, independently arrived at, of its own volition, to refuse to sell to persons who were aiding the unions in the local controversy (pp. 305, 6).

The evidence clearly shows that there was no coercion, solicitation or pressure brought by any of these defendants upon the Sandusky Company (which by the way is not one of the defendants) to induce it to refuse to sell to dealers cooperating with the unions. This is made clear not only by the affidavits of Rogers (p. 442) and George (p. 448), but also by the affidavit of Federal Agent Kage (p. 305).

The evidence also clearly shows that the Sandusky Company during the entire controversy, shipped its specialty cement into California without requiring permits (pp. 455, 6). When it is borne in mind that the cement sold by the Sandusky Company is used in very small quantities for finishing purposes only, and the fact that it shipped into California in 1921 twenty-three carloads; in 1922 fifty-seven carloads, and in 1923 up to

October 1, forty-two carloads (pp. 443, 4), all without permits, it must be concluded that the alleged direct interferences in the Sandusky case did not exist, and that the acts shown had nothing to do with the conspiracy charged against the defendants.

3. Keene Cement (Best Bros.).

The complainant attempted to show that Best Bros., operating a plant in Kansas, refused to sell Keene Cement produced by it, to the Golden Gate Building Materials Company of San Francisco, because the Golden Gate Company did not have a permit of the San Francisco Builders Exchange. The facts show directly to the contrary. The evidence on this consists entirely of correspondence passing between Best Bros. and their local agent in San Francisco, and also with Mr. George of the Henry Cowell Lime & Cement Company, which handled a competing brand of cement. These letters show that the Golden Gate Company was composed of five plastering firms which were themselves members of the Builders Exchange. They show further that these five plastering firms formed the Golden Gate Company for the sole purpose of securing dealers' prices, when as plastering contractors they were not entitled to receive such dealers' prices; that as a result the various dealers protested to the cement companies; that these protests were communicated to Best Bros. in Kansas, and that as a result thereof Best Bros., desiring to observe the rules of the trade wrote that they would refuse further orders from the Golden Gate Company although they continued to sell directly to the plastering firms who owned all of the

stock of the Golden Gate Company (pp. 387, 388, 328, 337, 330, 390, 392, 338, 331, 340, 335, 342).

As a matter of fact there is no direct evidence that any orders were in fact refused or any shipments were not made. The evidence clearly shows that so far as the defendant associations are concerned the officials thereof openly stated that they had no objection whatever to sales being made to the Golden Gate Company and positively announced to the officials of the different cement companies that they would not tolerate any discrimination against the Golden Gate Company, and that such companies would not be permitted to use the American Plan as an excuse for gaining trade advantages (pp. 338, 335, 342). The opposition resulting in the statement by Best Bros. that the orders of the Golden Gate Company would be refused, was due entirely to the action of dealers in California who resented the fact that plastering contractors, by combining, could obtain dealers' prices (pp. 456, 445-7, 467).

The evidence also shows that the competitive dealers in California endeavored to turn this situation to their own advantage in discrediting the use of Keene Cement in that State (p. 338).

4. Standard Gypsum Company.

The contention of the Government here is that the Standard Gypsum Company which had its plant in Nevada and its main office in San Francisco, refused to fulfill its contract for materials with the Golden Gate Building Materials Company by reason of the opposition of certain dealers in the San Joaquin Valley,

California, who stated that they would refuse to deal with the Standard Gypsum Company if it continued to sell to the Golden Gate Company (pp. 326, 7). This objection on the part of the San Joaquin dealers was the same as that dealt with in the Best Bros. Keene Cement matter, and was founded upon the objection of dealers to the sale of materials direct to a concern which was merely a combination of consumers and not legitimate dealers (p. 327).

In this connection it should be remembered that at no time did the permit system extend beyond San Francisco and its immediate vicinity and that at no time did it apply to the San Joaquin Valley. The affidavit of Government witnesses in relation to this incident (Barrymore, p. 327) reveals that no permits were ever required for materials in the San Joaquin Valley or outside the San Francisco District. Therefore, it is apparent that the objections to selling to the Golden Gate Company were based on matters of trade policy by men unconnected with the American Plan or the Permit System.

5. Pacific Portland Cement Company.

The contention of the Government in this connection is that the Pacific Portland Cement Company refused to sell cement to the Golden Gate Building Materials Company. The Pacific Portland Cement Company is a California corporation manufacturing all its cement in California, but having a plaster works in Nevada. This plaster is taken to San Francisco and there warehoused, from which point it makes all of its Cali-

fornia deliveries (pp. 467, 70). The affidavit of the Government witness (Knowles, p. 311) is to the effect that the Pacific Portland Company refused to fill orders of the Golden Gate Company. The statements in this affidavit are flatly contradicted by those of Towle, secretary of the Pacific Portland Company (p. 470), who testifies that no orders of the Golden Gate Company were ever refused, and in support thereof sets forth the actual shipments made to the Golden Gate Company showing that shipments to the Golden Gate Company of large quantities of cement and plaster had been made by the Pacific Portland Company during the very period in which the Government witness claims that shipments were refused.

6. Three Forks-Portland Cement Company, McCormick S. S. Co.

The contention of the Government here is that the Golden Gate Building Materials Company of San Francisco contracted to buy certain materials from the Three Forks-Portland Cement Company, a Montana concern, to be forwarded by rail to Portland, Oregon, and thence to San Francisco by ship; that the McCormick Steamship Company advised the Golden Gate Company that if it transported materials for the Golden Gate Company it would lose the business of other dealers in San Francisco, and therefore it would be necessary to raise the freight rates for such shipments (Knowles, p. 320). Aside from the improbability of any such statement being made by a common carrier which under the law is guilty of a criminal act if it discriminates against a shipper, the affidavits of the

President and the Traffic Manager of the Steamshi
Company (McCormick, p. 463 and Strittmatter, p. 46
deny categorically and positively that any such stat
ments were ever made, and on the contrary assert th
the Steamship Company during the period in questio
did carry large quantities of building materials for t
Golden Gate Company at the regular rates.

7. Pirie Lime Syndicate.

The contention of the Government in this matter
that the San Francisco agent of the Pirie Lime Synd
cate of British Columbia accepted an order for 15
barrels of lime from the Golden Gate Building M
terials Company, and thereafter requested the cancell
tion of said order. The testimony respecting this in
dent is by the affidavit of A. Knowles (p. 321) w
made the affidavits in most of the instances alrea
referred to. The statements of Knowles are denied
the affidavits of Hughes, San Francisco Agent for t
Pirie Lime Syndicate (pp. 322-393), Levy (p. 45
Fagan (p. 446), and also by the correspondence. Th
testimony shows conclusively that the request for t
cancellation originated with the Golden Gate Compa
itself, which, prior to the date of shipment, had e
braced the American Plan.

8. Sandusky Cement Company (Civic Center Supply Company).

The contention of the Government in this connecti
is that the Civic Center Supply Company of San Fra
cisco which had been actively engaged in supplyi
building materials to the unions, was refused cement
the Sandusky Cement Company of Ohio (pp. 295, 6). T

answer to this contention is the same answer that applies to the incident mentioned as No. 2 above, that is, that the Sandusky Company, of its own volition, and without any argument, persuasion or pressure on the part of any of these defendants, came to the conclusion that it did not desire to sell to the Civic Center Supply Company. As stated above, shipments of materials were constantly being made by the Sandusky Company from Ohio to San Francisco and vicinity for building purposes without permits, and there is absolutely no showing that the refusal claimed in this instance had any connection whatever with any acts on the part of the defendants, or was the result of any agreement between them (pp. 455, 6; 443, 4).

9. Tacoma and Roche Harbor Lime & Cement Co.

The contention of the Government in this connection is that the Civic Center Supply Company of San Francisco entered into an agreement with the Tacoma and Roche Harbor Lime Company, operating a plant in the State of Washington, for the shipment to it of 250 barrels of lime and that such shipment was not made by reason of the activities of the defendants (Chamberlin, pp. 296-8).

The affidavit of Reveal (pp. 313, 14; 466, 7) the agent in San Francisco of the Lime Company is that no such refusal was made; that the said 250 barrels of lime alleged to have been purchased by the Civic Center Company were part of a general consignment of lime sent to San Francisco from Washington, to supply the demands of the company in that city; that in accordance with its

contract with Atlas Mortar Company of that city to supply to it a minimum of 3000 barrels per month, said 250 barrels were delivered to the Atlas Mortar Company under said agreement; that at no time were the orders of the Civic Center Company refused, it being supplied by Tacoma and Roche Harbor Lime Company at all times during the period under consideration without the necessity or requirement of any permit. The affidavit of George (p. 455) shows affirmatively that at no time was any permit ever required for the sale or delivery of lime of the Tacoma and Roche Harbor Lime Company.

10. Simmons Incident.

The Government introduced the affidavit of Bennett (p. 47) attorney for the Building Trades Council in San Jose, and the affidavit of Cambiano (p. 50) Secretary of said Building Trades Council, to the effect that one Simmons, who is one of the defendants in this action, refused to sell materials to them, and in fact cancelled a sale of two cars of cement previously made; that Simmons stated the reason for this cancellation and action was that threats were made by some of the defendants that he would be injured financially if he continued to supply materials to the labor unions in San Jose. The Government testimony is contradicted by the affidavits of Mr. Kuhl (pp. 401-2), attorney for the defendants, and W. H. George (pp. 396-8), which show that the transaction involved the private warfare between the Cowell Company and the San Jose unions,

having nothing to do with the American Plan or the Permit System.

It is attempted in the affidavits first mentioned to show that certain proposed shipments of Belgium cement were prevented. It is worthy of note in this connection that the importation of Belgium cement and other foreign cements increased during the period of the controversy (p. 397).

Summary of Evidence on Alleged Direct Interferences.

We point out in connection with these so-called direct interferences with interstate commerce, the following facts:

1. That they consist in but ten instances in all, during a period of more than one year.

2. That the total amount of materials involved is small, probably not to exceed $30,000, during a period when more than $100,000,000 of building work was being done in San Francisco.

3. That but four parties in all are involved, the Golden Gate Building Materials Company, a concern formed by five plastering contractors for the purpose of securing dealers' prices; the Civic Center Supply Company; Gray-Thorning Company, which was invading the territory exclusively allotted to other dealers, and Alexander Gray, a union official masquerading under an assumed name, and giving false information as to the destination of the materials he sought to purchase.

4. That in no case have these alleged refusals been connected with the principal defendants, or shown to

have been pursuant to the plan or agreement between the defendants to establish the American Plan in San Francisco. They are in each and every instance due either to trade causes separate from the industrial controversy or represent the independent judgment of a stranger as to the justice of the cause of those who favored the American Plan.

These facts are particularly noteworthy when it is considered that for months the Government with a corps of investigators combed the records of these defendants, interviewing every person and investigating every firm which it was thought might possibly be connected with or interested in the industrial situation in San Francisco. And what does the record show? What have these efforts produced? A handful of minor transactions, strikingly insignificant, as to all of which evidence appears which removes them from and sets them apart from the local efforts to establish open industrial conditions in San Francisco.

The record shows that the plan of action of the defendants, namely, the Permit System, was one which sedulously avoided touching upon, interfering with, or affecting in any way, however remote, materials which were or could be the subject of interstate commerce.

The materials which were placed upon the permit list were chosen because they were produced in the State of California and were to be consumed in the City of San Francisco. Materials produced in states other than California were carefully excluded from the list so as to prevent any connection whatever with interstate commerce, however justifiable the ends.

None of the instances relied upon by the Government, namely, the so-called direct interferences, were shown to be, and from the very nature of the Permit System could not have been, in pursuance of a general plan of action or a general conspiracy to which all the defendants were parties. All refusals to sell were induced by causes other than general agreement of the defendants, with which these defendants had no connection or concern. If any of the facts relied upon were done with a view to attaining the end sought by the defendants, such acts were the independent efforts of individuals for which the defendants should not be held responsible.

Conclusion.

The case at bar is apparently the first case to come before this court involving an attempt to invoke the powers of the United States in connection with an industrial dispute wholly local in its area, for the purpose of aiding one of the parties to the controversy. In the *Coronado* case and in the *Herkert & Meisel* case, private parties did seek unsuccessfully to apply the Anti-Trust Act to local controversies arising out of disputes between employer and employee. But never before, so far as we have been able to discover, has a bill in equity brought under the authority of the Attorney General for the purpose of interfering in local industrial disputes carried on by peaceful means come before this court. The decree in the lower court opens a limitless field for the intervention of the national authority. If the indirect restraint of commerce, resulting from a combination for the purpose of changing conditions in the building industry in San Francisco, is a combination in restraint of trade, because it requires conformity with certain economic practices deemed beneficial to the community or to employers of labor, it becomes impossible to draw any line of demarcation between permissible and non-permissible associations. And since a combination is none the less obnoxious to the Anti-Trust Act, though it is aimed at the improvement of conditions, if it actually restrains interstate commerce, the result will be to make unlawful weapons now used in the industrial conflict by both parties. A local strike of workmen or clerks engaged in working on articles of interstate commerce or in selling them,

though the means used by the strikers do not involve acts or combinations extending into other states, as they did in the *Duplex* case and in *Loewe v. Lawlor,* may be withdrawn from the sphere of the lawful and placed in that of the illegal by the application of the Anti-Trust Act. Similarly, local boycotts on shops selling local and foreign products may be drawn out of the jurisdiction of the state though the boycott is addressed to the individual selling the goods because he is deemed unjust to labor, and not against the products as such. So lockouts by employers who sell goods, imported from other states along with those of home production, may be drawn into the same current by the same means. Indeed, the decree in the present case goes perhaps further than the hypothetical cases. It forbids San Francisco producers from refusing to sell sand or gravel produced in California to other San Franciscans, because the refusal may remove these San Franciscans as probable purchasers of goods from other states by decreasing their incentives to buy such goods. As said by counsel in the *Coronado* case, such extensions of Federal power (and they are no more extreme than those involved in the present decree) "would destroy the Constitution itself" (259 U. S. 344, 358). Economic pressure exercised at any point, of necessity, affects to some degree the movement of goods in interstate commerce. But to interpret the Anti-Trust Act in the terms of a logic so absolute would fundamentally destroy its purpose. The interpretation of the act must be on lines of practical logic, not of abstract generalization, if it is to have useful results.

The decisions of this court have marked out general boundaries within which individuals may shape their policies without danger of interference. The defendants in the present case have moved within the lines designated. Their united actions fall outside the limitations of the Anti-Trust Act as interpreted by this court.

First, they did not directly interfere with interstate commerce in any respect. The Builders' Exchange under its Permit System expressly avoided such interference by confining that system to materials produced in the State of California, such as lime, cement, brick, etc.

Second, the defendants had no intent to restrain interstate commerce, to limit competition, to raise prices or to establish monopoly. Their purpose had nothing to do with trade or commerce. It was directed solely toward changing existing conditions in the building industry, which were believed to be detrimental to workers and employers as well as to the general public.

Third, the industrial conflict was confined to a local arena. There was no attempt to carry it beyond state lines by means of a boycott or otherwise. The acts involved in this bill were done in San Francisco. National or interstate transactions were not involved.

Fourth, the interference with interstate commerce, if any, was inconsiderable in amount.

Fifth, the acts of the defendants did not involve unreasonable or undue restraint of trade or commerce. The purpose and result of the acts were to overcom

the handicaps imposed upon the building industry by the abuses in connection with the closed shop in San Francisco, abuses which were preventing the necessary building operations for the comfort and health of the people of that city.

The court has always recognized that the ordinary practices of business life, though they may result in some interference with interstate commerce, are not obnoxious to the Anti-Trust Act. Persons may combine and contract with each other by means usual to business to obtain objects recognized as valid and desirable, notwithstanding the acts. The attainment of proper ends by means of the employment of the usual machinery involved in industrial disputes is an aim not forbidden. As between the immediate parties, "those who are proximately and substantially concerned as parties to an actual dispute" (254 U. S. at p. 472), they may "push their struggle to the limits of the justification of self interest" (254 U. S. at p. 488). True, there may be limits to a conflict when "those engaged in it cannot continue their struggle without danger to the community" (254 U. S. at p. 488). But in the present case no danger was threatened to the community. There was no reason why the struggle should not be permitted to proceed with lawful weapons in a local arena, between the immediate parties. Even if to some extent commerce between the states had been temporarily impeded, which was not the case, the restraint cannot be said to be undue where it is purely incidental to the industrial conflict.

It is respectfully submitted that the decree of the District Court should be reversed.

Dated, San Francisco,
January 20, 1925.

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